

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 24

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PROPOSED
adoption of NEW RULE I)	ADOPTION
relating to marketing and)	
business development)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On January 25, 2003, the Montana Department of Agriculture proposes to adopt the above stated rule relating to marketing and business development.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on January 9, 2003, to advise us of the nature of the accommodation that you need. Please contact Brent Poppe at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

3. The rule as proposed to be adopted provides as follows:

NEW RULE I RIGHTS TO INTELLECTUAL PROPERTY AND PROPRIETARY INFORMATION - CONFIDENTIALITY - AGRICULTURE MARKETING AND BUSINESS DEVELOPMENT ASSISTANCE

(1) All intellectual property including any patents, copyrights, trademarks, trade secrets, and privately held financial information developed by an individual or business shall not be publicly disclosed by department employees.

(2) Unless otherwise required by law, information submitted to department employees by an individual or business will be treated as confidential except the following:

(a) name and address of entity;

(b) short description of proposed agricultural development project;

(c) the dollar amount of funding assistance being requested;

(d) the program(s) under which the entity is seeking information or assistance; and

(e) any other information in which the demand of individual privacy clearly exceeds the merits of public disclosure when the entity has waived its right to privacy.

(3) This rule is based on the department's finding that except for the information described in items (2)(a) through (e), the demands of individual privacy clearly exceed the merits of public disclosure of the personal, financial, and

business information that is provided to department employees while executing the agriculture marketing and business development duties assigned to the department.

AUTH: 2-15-112, MCA
IMP: 80-1-102 and 80-11-103, MCA

REASON: The Agriculture Marketing and Business Development Bureau of the Montana Department of Agriculture is mandated to provide agriculture marketing and business development assistance to entities requesting assistance from the department and the Agricultural Development Council. In carrying out the duties of the department and the Agricultural Development Council, department employees gain access to and knowledge of proprietary information, trade secrets, and other intellectual properties, that if publicly disclosed under Article II, Section 9, of the Constitution of the State of Montana, would cause economic harm to the entity owning that property and would violate that entity's right to privacy under Article II, Section 10, of the Constitution of the State of Montana. The proposed rule is necessary to establish an administrative guideline that defines the information that shall be disclosed and the information that shall be held as confidential in the instance that a public demand for information is made.

4. Concerned persons may submit their data, views or arguments concerning this proposed adoption in writing to Brent Poppe at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than January 23, 2003.

5. If persons who are directly affected by the proposed adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Brent Poppe at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. A written request for hearing must be received no later than January 23, 2003.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 15 persons

based on 150 individuals or entities requesting agriculture marketing or business development assistance from the department or the Agricultural Development Council.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding noxious weed seed forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Proposed Notice is available through the department's website at www.agr.state.mt.us, under the Administrative Rules section. The department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA do not apply.

DEPARTMENT OF AGRICULTURE

/s/ Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rules Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PROPOSED
amendment of ARM 4.3.604)	AMENDMENT
relating to rural assistance)	
loan program limitations)	NO PUBLIC HEARING
)	CONTEMPLATED

TO: All Concerned Persons

1. On January 25, 2003, the Montana Department of Agriculture proposes to amend the above stated rule relating to rural assistance loan program limitations.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on January 9, 2003, to advise us of the nature of the accommodation that you need. Please contact Lee Boyer at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us.

3. The rule as proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

4.3.604 LIMITATIONS (1) Loan amounts shall not exceed ~~\$35,000~~ \$50,000 for any one individual ~~or \$70,000 per~~ household.

(2) Loans may be refinanced up to the maximum of ~~\$35,000~~ \$50,000.

AUTH: 80-2-106, MCA
IMP: 80-2-103, MCA

REASON: In today's agricultural financial market it is often difficult for some producers to obtain financing to purchase sufficient livestock or real estate to create an adequate cash flow for a profitable operation. The cost of all inputs for livestock and crop operations have all increased tremendously which exacerbates the problem. The loan amount increase would allow us to provide assistance to more producers and further enhance the agricultural industry in Montana.

The increase in the loan maximums will benefit approximately 3100 farm and ranch youth who may apply for assistance and the cumulative benefit of the increase would be a maximum of \$15,000 per successful applicant.

4. Concerned persons may submit their data, views or arguments concerning this proposed amendment in writing to Lee Boyer at the Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. Any comments must be received no later than January 23, 2003.

5. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Lee Boyer at the Montana Department of Agriculture, P.O. Box 200201, Helena, MT 59620-0201; Phone: (406) 444-2402; TTY: (406) 444-4687; Fax: (406) 444-5409; or E-mail: agr@state.mt.us. A written request for hearing must be received no later than January 23, 2003.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected have been determined to be 31 persons based on 3125 farm and ranch youth.

7. The Department of Agriculture maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding noxious weed seed forage, noxious weeds, alfalfa seed, agriculture in Montana schools program, agriculture development, pesticides, warehouseman, produce, mint, seed, alternative crops, wheat research and marketing, rural development and/or hail. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 N. Roberts, P.O. Box 200201, Helena, MT 59620-0201; Fax: (406) 444-5409; or E-mail: agr@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

8. An electronic copy of this Proposal Notice is available through the department's website at www.agr.state.mt.us, under the Administrative Rules section. The department strives to make the electronic copy of the Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the

electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor notice requirements of 2-4-302, MCA do not apply.

DEPARTMENT OF AGRICULTURE

/s/ Ralph Peck
Ralph Peck
Director

/s/ Tim Meloy
Tim Meloy, Attorney
Rules Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE COMMUNITY DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of) NOTICE OF PUBLIC HEARING ON
a new rule pertaining to the) PROPOSED ADOPTION
administration of the 2003-2004)
Federal Community Development)
Block Grant Program)

TO: All Concerned Persons

1. On January 15, 2003, at 1:30 p.m., the Department of Commerce will hold a public hearing in Room 202 of the Park Avenue Building, 301 S. Park Ave., Helena, Montana, to consider the proposed adoption of a rule pertaining to the administration of the 2003-2004 Federal Community Development Block Grant Program.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Local Government Assistance Division no later than 5:00 p.m., January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Richard M. Weddle, Community Development Division, 301 S. Park Ave., P.O. Box 200523, Helena, Montana 59620-0523; telephone (406)481-2781; Montana Relay 1-800-253-4091; TDD (406)841-2702; facsimile (406)481-2771 or by E-mail, addressed to rweddle@state.mt.us.

3. The proposed new rule provides as follows:

NEW RULE I INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 2003-2004 CDBG PROGRAM (1) The department of commerce herein adopts and incorporates by this reference the Montana Community Development Block Grant Program 2004 Application Guidelines for Housing and Public Facilities Projects, the Montana Community Development Block Grant Program 2003 Application Guidelines for Economic Development Projects, and the Montana Community Development Block Grant Program 2004 Grant Administration Manual published by it as rules for the administration of the 2003 CDBG program.

(2) The rules incorporated by reference in (1) relate to the following:

- (a) policies governing the program;
- (b) requirements for applicants;
- (c) procedures for evaluating applications;
- (d) procedures for local project start up;
- (e) environmental review of project activities;
- (f) procurement of goods and services;
- (g) financial management;
- (h) protection of civil rights;
- (i) fair labor standards;

- (j) acquisition of property and relocation of persons displaced thereby;
- (k) administrative considerations specific to public facilities, housing rehabilitation and community revitalization and economic development projects;
 - (l) project audits;
 - (m) public relations;
 - (n) project monitoring; and
 - (o) planning assistance.
- (3) Copies of the regulations adopted by reference in (1) of this rule may be obtained from the Department of Commerce, Community Development Division, 301 S. Park Ave., P.O. Box 200523, Helena, Montana 59620-0523.

AUTH: 90-1-103, MCA
IMP: 90-1-103, MCA

REASON: It is reasonably necessary to adopt this rule because the federal regulations governing the state's administration of the 2003-2004 CDBG program and section 90-1-103, MCA, require the Department to adopt rules to implement the program. Local government entities must have these application guidelines before the entities may apply to the Department for financial assistance under the CDBG program. The Application Guidelines describe the federal and state requirements with which local governments must comply in order to apply for CDBG funds. The Grant Administration Manual is primarily a restatement and explanation of existing federal and state statutory and regulatory requirements, as well as additional departmental requirements, with which local CDBG recipients must comply in administering their CDBG projects. The Manual includes sample forms and letters, checklists, and explanatory text to help local government officials comply with the variety of requirements that apply to economic development, housing and public facility projects.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Community Development Division, 301 S. Park Ave., P.O. Box 200523, Helena, Montana, 59620-0523, or by facsimile number (406) 841-2771, to be received no later than 5:00 p.m., January 23, 2003.

5. Richard M. Weddle has been designated to preside over and conduct this hearing.

6. The Community Development Division maintains a list of interested persons who wish to receive notices of rulemaking actions relating to the CDBG program. Persons who wish to have their name added to this list may make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all CDBG administrative rulemaking proceedings. The request may be mailed or delivered to the Community Development

Division, 301 S. Park Ave., P.O. Box 200523, Helena, MT 59620-0523 or by phone at (406) 841-2781, or may be made by completing a request form at any rules hearing held by the agency.

7. The sponsor notification requirements of 2-4-302, MCA, do not apply.

COMMUNITY DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE

BY: /s/ MARK A. SIMONICH
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

Reviewed by:

/s/ G. Martin Tuttle
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State, December 16, 2002.

BEFORE THE COMMUNITY DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment) NOTICE OF PUBLIC HEARING ON
of ARM 8.94.3718 pertaining to) PROPOSED AMENDMENT
the administration of the 2002-)
2003 Federal Community)
Development Block Grant Program)

TO: All Concerned Persons

1. On January 15, 2003, at 1:30 p.m., a public hearing will be held in Room 202 of the Park Avenue Building, 301 S. Park Ave., Helena, Montana, to consider the amendment of ARM 8.94.3718 governing the administration of the 2002-2003 federal Community Development Block Grant (CDBG) Program.

2. The Department of Commerce will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Commerce no later than 5:00 p.m., on January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Richard M. Weddle, Community Development Division, P.O. Box 200523, Helena, Montana 59620-0523; telephone (406) 841-2781; Montana Relay 1-800-253-4091; TDD (406) 841-2702; facsimile (406) 841-2771 or by E-mail, addressed to rweddle@state.mt.us.

3. The rule proposed to be amended provides as follows: (stricken matter interlined, new matter underlined)

8.94.3718 INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 2002-2003 CDBG PROGRAM (1) The department of commerce herein adopts and incorporates by this reference the Montana Community Development Block Grant Program 2002-2003 Application Guidelines for Housing and Public Facilities Projects, as amended in January 2003, the Montana Community Development Block Grant Program 2002 Application Guidelines for Economic Development Projects, and the Montana Community Development Block Grant Program 2002-2003 Grant Administration Manual published by it as rules for the administration of the 2002-2003 CDBG program.

(2) The rules incorporated by reference in (1) relate to the following:

- (a) policies governing the program;
- (b) requirements for applicants;
- (c) procedures for evaluating applications;
- (d) procedures for local project start up;
- (e) environmental review of project activities;
- (f) procurement of goods and services;
- (g) financial management;
- (h) protection of civil rights;

- (i) fair labor standards;
 - (j) acquisition of property and relocation of persons displaced thereby;
 - (k) administrative considerations specific to public facilities, housing rehabilitation and community revitalization and economic development projects;
 - (l) project audits;
 - (m) public relations;
 - (n) project monitoring; and
 - (o) planning assistance.
- (3) Copies of the regulations adopted by reference in (1) of this rule may be obtained from the Department of Commerce, ~~Local Government Assistance~~ Community Development Division, ~~1424 Ninth Avenue~~ 301 S. Park Ave., P.O. Box ~~200501~~ 200523, Helena, Montana ~~59620-0501~~ 59620-0523.

Auth: 90-1-103, MCA
IMP: 90-1-103, MCA

REASON: It is reasonably necessary to amend this rule to institute the modification described below:

The Department is proposing to earmark \$25,000 of its FY 2003 CDBG Housing and Public Facilities grant funds for a contract with Montana Rural Development Partners, Inc., Anaconda, MT, to provide technical assistance to local governments in preparing local needs assessments and in carrying out other strategic planning activities.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Richard Weddle, Community Development Division, P.O. Box 200523, Helena, Montana 59620-0523, or by facsimile (406) 841-2771, or by E-mail, addressed to rweddle@state.mt.us to be received no later than 5:00 p.m., January 23, 2003.

5. Richard M. Weddle will preside over and conduct the hearing.

6. The Community Development Division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the Division. Persons who wish to have their name added to this list may make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding rules relating to the Community Development Block Grant Program. This request may be mailed or delivered to the Division, faxed to the office at (406) 841-2771 or may be made by completing a request form at any rules hearing held by the Division.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

COMMUNITY DEVELOPMENT DIVISION
DEPARTMENT OF COMMERCE

BY: /s/ MARK A. SIMONICH
MARK A. SIMONICH, DIRECTOR
DEPARTMENT OF COMMERCE

Reviewed by:

/s/ G. Martin Tuttle
G. MARTIN TUTTLE, RULE REVIEWER

Certified to the Secretary of State, December 16, 2002.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING
amendment of ARM 10.20.106) ON PROPOSED AMENDMENT
relating to students placed)
in education programs)

TO: All Concerned Persons

1. On January 21, 2003 at 10:00 a.m. a public hearing will be held in the conference room of the Office of Public Instruction, 1227 11th Avenue, Helena, Montana, to consider the amendment of a rule relating to students placed in education programs.

2. The Office of Public Instruction (OPI) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact OPI no later than 5:00 p.m. on January 9, 2003 to advise us of the nature of the accommodation that you need. Please contact Beverly Marlow, P.O. Box 202501, Helena, MT 59620-2501, telephone: (406) 444-3172, TDD number: (406) 444-1812, FAX: (406) 444-2893, e-mail: opirules@state.mt.us

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

10.20.106 STUDENTS PLACED IN EDUCATION PROGRAMS

(1) through (1)(c)(i) remain the same.

(ii) the student's education program is under the direction and supervision of the district and is provided by district staff or is provided pursuant to a special education individualized education program implemented by the district. This provision will be applied retroactively to July 1, 2002; and

(d) through (4) remain the same.

AUTH: Sec. 20-7-419, MCA

IMP: Sec. 20-5-321, MCA

4. Statement of Reasonable Necessity: The Superintendent of Public Instruction proposes to adopt an expansion of the rule pertaining to students placed in education programs. In June 2002, the Superintendent of Public Instruction adopted a new rule concerning this matter to clarify that the district tuition fund may not be used for payments to a private education program and also to clarify that the district responsible for paying a private education program for a student's education program may include that student in the district's enrollment count for ANB (average number belonging) purposes.

This rule modification is intended to expand the circumstances under which a district may include a student in the district's enrollment count for purposes of calculating ANB. The philosophy underlying ARM 10.20.106 is that a district should be able to include a student in ANB if the district maintains responsibility for the student even if the student is educated by someone else and if the education provider can demonstrate public accountability. The addition of a student with an individualized education program (IEP) is reasonable in this context. In the case of a student with an IEP, the district remains responsible for the student's education and therefore the district should be able to count that student for ANB purposes.

The retroactive application is intended to allow districts to include students with an IEP to be counted for ANB purposes in this current fiscal year.

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted by mail to OPI, P.O. Box 202501, Helena, MT 59620-2501, or by e-mail to opirules@state.mt.us and must be received no later than 5:00 p.m. on January 23, 2002.

6. Jeffrey A. Weldon has been designated to preside over and conduct the hearing.

7. OPI maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding special education funding or other school related rulemaking actions. Such written request may be mailed or delivered to Legal Services, OPI, P.O. Box 202501, Helena, Montana 59620-2501, faxed to the office at (406) 444-2893, or may be made by completing a request form at any rules hearing held by OPI.

8. The bill sponsor requirements of 2-4-302, MCA, do not apply. The requirements of 20-1-501, MCA, have been fulfilled. Copies of these rules have been sent to all tribal governments in Montana.

/s/ Linda McCulloch
Linda McCulloch
State Superintendent
Office of Public Instruction

/s/ Jeffrey A. Weldon
Jeffrey A. Weldon
Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
AND THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the)	
adoption of new rule I	)	NOTICE OF PROPOSED
pertaining to cooperative	)	ADOPTION
agreements with landowners)	
to allow fishing access on	)	NO PUBLIC HEARING
private property	)	CONTEMPLATED

TO: All Concerned Persons

1. On February 13, 2003, the Fish, Wildlife and Parks Commission (commission) and the Department of Fish, Wildlife and Parks (department) propose to adopt new rule I pertaining to cooperative agreements with landowners to allow fishing access on private property.

2. The commission and department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 8, 2003, to advise us of the nature of the accommodation that you need. Please contact Debbie McRae, 1420 East Sixth Ave., P.O. Box 200701, Helena, MT 59620-0701; phone (406) 444-3750; fax (406) 444-4952.

3. The proposed new rule provides as follows:

NEW RULE I COOPERATIVE FISHING ACCESS AGREEMENTS (1) The department may provide monetary benefits under 87-1-285, MCA, to a landowner who enters into a cooperative agreement with the department to allow public fishing access across or on the landowner's property.

(2) In determining whether or not to enter into a cooperative agreement and/or the amount of monetary benefits paid under the agreement, the department shall evaluate the public benefit of acquiring access to the site. The department shall use the 2002 private land fishing access scoring form to make this evaluation. This form is incorporated by reference as part of this rule and is available for the Department of Fish, Wildlife and Parks, Fisheries Division, 1420 East Sixth Ave., P.O. Box 200701, Helena, MT 59620-0701.

(3) The score a site receives on the 2002 fishing access scoring form will determine the amount of landowner benefits, if any, that the department offers to the landowner for the purpose of acquiring fishing access.

(4) Compensation schedules will be prorated biennially to conform to legislative appropriations for the program.

AUTH: 87-1-285, MCA
IMP: 87-1-285, MCA

4. This rule is necessary to implement House Bill 292 which was passed by the 2001 Montana Legislature. This bill authorizes the department to establish programs that provide incentives and benefits to private landowners who allow public access to fishing on or across their lands free of charge. The bill charges the commission with the responsibility to develop criteria that allocate tangible benefits to private landowners but directs the department to establish programs and develop rules to carry out the public fishing access program; therefore, these rules are being proposed under joint commission and department authority.

A scoring form approved by the commission allows the department to objectively evaluate the benefits of a given site and assign a monetary value to public access at the site. This form is incorporated into this rule by reference. This rule allows the department and commission to carry out the purposes of the fishing access enhancement program envisioned by House Bill 292.

5. Concerned persons may submit their data, views or arguments concerning the proposed adoption in writing to Allan Kuser, 1420 East Sixth Ave., P.O. Box 200701, Helena, MT 59620-0701; phone (406) 444-7885; fax (406) 444-4952; email akusar@state.mt.us. Any comments must be received no later than January 24, 2003.

6. If persons who are directly affected by the proposed adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Allan Kuser, 1420 East Sixth Ave., P.O. Box 200701, Helena, MT 59620-0701. The comments must be received no later than January 24, 2003.

7. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 3,912 persons based on the number of fishing licenses sold in 2001.

8. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their

name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

9. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

By: /s/ Dan Walker
Dan Walker, Chairman
Fish, Wildlife and Parks
Commission

By: /s/ M. Jeff Hagener
M. Jeff Hagener, Director
Department of Fish,
Wildlife and Parks

By: /s/ John F. Lynch
John F. Lynch
Rule Reviewer

Certified to the Secretary of State December 16, 2002

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption)
of new rules I through V) NOTICE OF PUBLIC
regulating and distributing) HEARINGS ON PROPOSED
recreational use on the) ADOPTION
Beaverhead and Big Hole rivers)

TO: All Concerned Persons

1. The Fish, Wildlife and Parks Commission (commission) will hold public hearings to consider the adoption of new rules regulating and distributing recreational use on the Beaverhead and Big Hole Rivers. The hearing dates and places are as follows:

February 26, 2003, 7 p.m.
Red Lion Inn
2100 Cornell Street
Butte, MT

February 27, 2003, 7 p.m.
Lewis and Clark Room
Western Montana College
Dillon, MT

February 28, 2003, 7 p.m.
Bethany Hall, Educational Room
211 1/2 South Main Street
Sheridan, MT

2. The Fish, Wildlife and Parks Commission (commission) will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of this notice. If you require an accommodation, contact the commission not later than 5:00 p.m. on January 3, 2003, to advise us of the nature of the accommodation that you need. Please contact Kari Janikula; 1400 South 19th, Bozeman, MT 59718; phone (406) 994-4042; fax (406) 994-4090.

3. The proposed new rules provide as follows:

NEW RULE I RIVER DEFINITIONS The following definitions apply to this subchapter:

(1) "Float fishing" means any fishing from a boat and wade fishing when fishing access is gained by boat.

(2) "Float outfitting" means the operation of any boat for commercial purposes by a fishing guide or outfitter.

(3) "Guide" means a person as defined in 87-37-101, MCA.

(4) "Official access site" means those river access sites that are publicly owned, managed, and maintained as an

access point. The following are official access sites on the Big Hole River:

- (a) High Road fishing access site;
 - (b) Pennington fishing access site;
 - (c) Notch Bottom fishing access site;
 - (d) Glen fishing access site;
 - (e) Brownes Bridge fishing access site;
 - (f) Maiden Rock BLM fishing access site;
 - (g) Divide fishing access site;
 - (h) Power House fishing access site;
 - (i) Dewey fishing access site;
 - (j) Jerry Creek fishing access site;
 - (k) Mallons fishing access site;
 - (l) Dickie Bridge fishing access site;
 - (m) Sportsman Park fishing access site;
 - (n) Fishtrap fishing access site; and
 - (o) Mudd Creek Bridge fishing access site.
- (5) "Outfitter" means a person as defined in 37-47-101, MCA.

(6) The commission shall repeal or amend this rule on or before May 1, 2005.

AUTH: 87-1-301, 87-1-303, MCA
IMP: 87-1-303, MCA

NEW RULE II BEAVERHEAD RIVER RECREATIONAL USE RESTRICTIONS (1) Starting on the third Saturday in May through Labor Day, recreational use of the Beaverhead River from Clark Canyon Dam to its mouth shall be allowed and restricted in designated river reaches as follows:

(a) in the river reach from Clark Canyon Dam to Henneberry fishing access site, each outfitter is limited to launching or use within the reach of a maximum of three boats in any day;

(b) in the river reach from Henneberry fishing access site to Barretts Diversion, each outfitter is limited to launching or use within the reach of a maximum of three boats in any day;

(c) in the river reach from Barretts Diversion to Highway 91 South (Tash) Bridge, each outfitter is limited to launching or use within the reach of a maximum of one boat in any day;

(d) the river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to any float outfitting; and

(e) in the river reach from Selway Bridge to Jessen Park in Twin Bridges, each outfitter is limited to launching or use within the reach of a maximum of one boat in any day.

(2) Float fishing by nonresidents and float outfitting is limited as follows on the Beaverhead River from the third Saturday in May through Labor Day:

(a) each Sunday float fishing by nonresidents and float outfitting is not permitted on the river reach from High Bridge fishing access site to Henneberry fishing access site;

(b) each Saturday float fishing by nonresidents and float outfitting is not permitted on the river reach from Henneberry fishing access site to Pipe Organ fishing access site.

(3) The commission shall repeal or amend this rule on or before May 1, 2005.

AUTH: 87-1-301, 87-1-303, MCA
IMP: 87-1-303, MCA

NEW RULE III BIG HOLE RIVER RECREATIONAL USE RESTRICTIONS

(1) Starting on the third Saturday in May through Labor Day, recreational use of the Big Hole River from its headwaters to High Road fishing access site shall be allowed and restricted by defining seven river zones with one zone closed to float outfitting each day and with the zone that is restricted on Saturday and the zone that is restricted on Sunday also closed to nonresident float fishing. The seven river zones are defined by river reach and restricted each day of the week as follows:

(a) each Sunday, the river reach from Divide fishing access site to Salmon Fly fishing access site is closed to any float fishing by nonresidents and to any float outfitting;

(b) each Monday, the river reach from Salmon Fly fishing access site to Glen fishing access site is closed to any float outfitting;

(c) each Tuesday, the river reach from the headwaters to Fishtrap fishing access site is closed to any float outfitting;

(d) each Wednesday, the river reach from Notch Bottom fishing access site to High Road fishing access site is closed to any float outfitting;

(e) each Thursday, the river reach from Fishtrap fishing access site to Jerry Creek fishing access site is closed to any float outfitting;

(f) each Friday, the river reach from Glen Bridge fishing access site to Notch Bottom fishing access site is closed to any float outfitting; and

(g) each Saturday, the river reach from Jerry Creek fishing access site to Divide fishing access site is closed to any float fishing by nonresidents and to any float outfitting.

(2) All float users, including each float outfitter, are limited to a total of two launches at or near each official access site per day on the Big Hole River. If a boat is launched at an unofficial site the launch will be counted as occurring at the nearest official site in determining the two-boat limit at or near each official access site.

(3) The commission shall repeal or amend this rule on or before May 1, 2005.

AUTH: 87-1-301, 87-1-303, MCA
IMP: 87-1-303, MCA

NEW RULE IV NEW OUTFITTER MORATORIUM AND OUTFITTER RESTRICTIONS ON THE BEAVERHEAD RIVER (1) Only an outfitter with documented use of the Beaverhead River prior to December 31, 1998, may continue to operate on the Beaverhead River, except as provided in (2).

(2) An outfitter who has not documented use on the Beaverhead River prior to December 31, 1998, may not operate on the Beaverhead River unless the outfitter was licensed by the board of outfitters between December 1, 1998, and July 1, 1999, and the outfitter's operating plan included the Beaverhead River.

(3) Each outfitter from July 1 through August 31, inclusive, on the Beaverhead River shall not exceed the number of client days served by the outfitter on the Beaverhead River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the board of outfitters will determine the number of client days in each year.

(4) The commission shall repeal or amend this rule on or before May 1, 2005.

AUTH: 87-1-301, 87-1-303, MCA
IMP: 87-1-303, MCA

NEW RULE V NEW OUTFITTER MORATORIUM AND OUTFITTER RESTRICTIONS ON THE BIG HOLE RIVER (1) Only an outfitter with documented use of the Big Hole River prior to December 31, 1998, may continue to operate on the Big Hole River, except as provided in (2).

(2) An outfitter who has not documented use on the Big Hole River prior to December 31, 1998, may not operate on the Big Hole River unless the outfitter was licensed by the board of outfitters between December 1, 1998, and July 1, 1999, and the outfitter's operating plan included the Big Hole River.

(3) Each outfitter from June 1 through July 31, inclusive, on the Big Hole River shall not exceed the number of client days served by the outfitter on the Big Hole River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the board of outfitters will determine the number of client days in each year.

(4) The commission shall repeal or amend this rule on or before May 1, 2005.

AUTH: 87-1-301, 87-1-303, MCA
IMP: 87-1-303, MCA

4. Because of increased user conflicts on the Beaverhead and Big Hole rivers, resource and property damage concerns, demands upon limited public facilities related to those use levels, and concerns over the quality of the recreation experience, the commission finds it necessary to

manage river recreational use on the Beaverhead and Big Hole rivers. These rules are part of that management.

The commission intends that management of use by means of these new rules will remain in place until the River Recreation Advisory Council appointed by the director has completed its recommendations to the commission, and the commission and the department have a statewide river recreation planning process in place.

The River Recreation Advisory Council is in the process of developing recommendations for how to manage river recreation and address issues of crowding and conflict among user groups. The commission will consider these recommendations and input from the public in order to develop statewide, consistent policies for river recreation management. It will then be up to the department to develop recreation plans that address specific resource and social issues on individual rivers, including the Beaverhead and Big Hole rivers. The recreation plans will be adopted by the commission and will be used by the commission in proposing and considering recreational use rules on individual rivers.

The commission believes that these proposed rules will protect the interests and resources on the Beaverhead and Big Hole rivers while allowing enough time for the River Recreation Advisory Council to complete its work and enough time for the commission and the department to integrate the results of the statewide river recreation planning process with the existing management efforts on the Beaverhead and Big Hole.

5. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Bruce Rich, Department of Fish, Wildlife and Parks, Attention: Beaverhead/Big Hole, 1400 South 19th, Bozeman, MT 59718; email fwpcomments@montana.edu, and must be received no later than March 12, 2003.

6. Pat Flowers or another representative appointed by the department will preside over and conduct the hearings.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be

made by completing the request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

By: /s/ M. Jeff Hagener
M. Jeff Hagener
Commission Secretary

By: /s/ Robert N. Lane
Robert N. Lane
Rule Reviewer

Certified to the Secretary of State December 16, 2002

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment)
of ARM 17.8.101, 17.8.102,)
17.8.103, 17.8.106, 17.8.110,)
17.8.302, 17.8.401, 17.8.402,)
17.8.801, 17.8.802, 17.8.818,)
17.8.819, 17.8.821, 17.8.901,)
17.8.902, 17.8.905, 17.8.1002,)
17.8.1201, 17.8.1202,)
17.8.1204, 17.8.1206,)
17.8.1212, 17.8.1213,)
17.8.1214, 17.8.1220,)
17.8.1224, 17.8.1226, and)
17.8.1232, pertaining to)
definitions and incorporation)
by reference of current)
federal regulations and other)
materials into air quality)
rules)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On January 29, 2003, at 10:30 a.m., the Board of Environmental Review will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., January 20, 2003, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@state.mt.us.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.8.101 DEFINITIONS As used in this chapter, unless indicated otherwise in a specific subchapter, the following definitions apply:

(1) remains the same.

(2) "Air pollutants" ~~means 1 or more air contaminants that are present in the outdoor atmosphere~~ has the meaning provided in 75-2-103(3), MCA.

(3) through (7) remain the same.

(8) "Boiler or industrial furnace" means any source or emitting unit that is subject to the provisions of 75-10-405(2)(f) and 75-10-406, MCA, and rules promulgated thereunder defining the class of activities subject to regulation under those sections, found at ~~ARM 17.54.1101~~ Title 17, chapter 53,

subchapter 10.

(9) ~~"Commercial hazardous waste incinerator" means an incinerator that burns hazardous waste, or a boiler or industrial furnace. The term "commercial hazardous waste incinerator" does not include a research and development facility that receives federal or state research funds and that burns hazardous waste primarily to test and evaluate waste treatment remediation technologies~~ has the meaning provided in 75-2-103(6), MCA.

(10) and (11) remain the same.

(12) ~~"Emission" means release of air contaminants into the ambient air~~ has the meaning provided in 75-2-103(8), MCA.

(13) through (18) remain the same.

(19) ~~"Hazardous air pollutant (HAP)" means any air pollutant listed as a hazardous air pollutant pursuant to section 7412(b)(1)~~ 112(b)(1) of the FCAA.

(20) ~~"Hazardous waste" means a substance defined as hazardous waste under either 75-10-403, MCA, or administrative rules found at ARM Title 17, chapter 54, subchapter 3, or a waste containing 2 parts or more per million of polychlorinated biphenyl~~ has the meaning provided in 75-2-103(10), MCA.

(21) remains the same.

(22) ~~"Incinerator" means any single or multiple chambered combustion device which burns combustible material, alone or with a supplemental fuel or catalytic combustion assistance, primarily for the purpose of removal, destruction, disposal, or volume reduction of all or any portion of the input material.~~

~~(a) Incinerators do not include:~~

~~(i) safety flares used for combustion or disposal of hazardous or toxic gases at industrial facilities such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants, or elemental phosphorus plants;~~

~~(ii) space heaters burning used oil;~~

~~(iii) wood-fired boilers; or~~

~~(iv) wood waste burners such as tepee, wigwam, truncated cone or silo burners~~ has the meaning provided in 75-2-103(11), MCA.

(23) ~~"Medical waste" means any waste that is generated in the diagnosis, treatment, or immunization of human beings or animals, in medical research on humans or animals, or in the production or testing of biologicals. The term includes:~~

~~(a) cultures and stocks of infectious agents;~~

~~(b) human pathological wastes;~~

~~(c) waste human blood or products of human blood;~~

~~(d) sharps;~~

~~(e) contaminated animal carcasses, body parts, and bedding that were known to have been exposed to infectious agents during research;~~

~~(f) laboratory wastes and wastes from autopsy or surgery that were in contact with infectious agents; and~~

~~(g) biological waste and discarded material contaminated with blood, excretion, exudates, or secretions from humans or animals~~ has the meaning provided in 75-2-103(12), MCA.

(24) through (29) remain the same.

(30) ~~"Person" means any individual, partnership, firm,~~

~~association, municipality, public or private corporation, the state or a subdivision or agency of the state, trust, estate, interstate body, federal government or an agency of the federal government, or any other legal entity has the meaning provided in 75-2-103(13), MCA.~~

~~(31) through (35) remain the same.~~

~~(36)(a) "Solid waste" means all putrescible and non-putrescible solid, semi-solid, liquid, or gaseous wastes, including but not limited to garbage; rubbish; refuse; ashes; swill; food wastes; commercial or industrial wastes; medical waste; sludge from sewage treatment plants, water supply treatment plants, or air pollution control facilities; construction, demolition or salvage wastes; dead animals, dead animal parts, offal, animal droppings, or litter; discarded home and industrial appliances; automobile bodies, tires, interiors, or parts thereof; wood products or wood byproducts and inert materials; styrofoam and other plastics; rubber materials; asphalt shingles; tarpaper; electrical equipment, transformers, insulated wire; oil or petroleum products, or oil or petroleum products and inert materials; treated lumber and timbers; and pathogenic or infectious waste.~~

~~(b) "Solid waste" does not mean municipal sewage, industrial wastewater effluent, mining wastes regulated under the mining and reclamation laws administered by the department, or slash and forest debris regulated under laws administered by the department of natural resources.~~

~~(c) This definition of "solid waste" is only applicable to the regulation of incinerators under the Montana Clean Air Act, Title 75, chapter 2, MCA, and regulations adopted pursuant thereto has the meaning provided in 75-2-103(16), MCA.~~

~~(37) through (42) remain the same.~~

~~(43) The definitions contained in 75-2-103, MCA, are applicable where appropriate.~~

AUTH: 75-2-111, MCA

IMP: Title 75, chapter 2, MCA

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES AND AVAILABILITY OF REFERENCED DOCUMENTS (1) Unless expressly provided otherwise, in this chapter where the board has:

(a) adopted a federal regulation by reference, the reference is to the July 1, 2001 2002, edition of the Code of Federal Regulations (CFR);

(b) remains the same.

(c) referred to a section of the Montana Code Annotated (MCA), the reference is to the 1999 2001 edition of the MCA;

(d) adopted another rule of the department or of another agency of the state of Montana by reference, the reference is to the December 31, 2001 2002, edition of the Administrative Rules of Montana (ARM).

AUTH: 75-2-111, MCA

IMP: Title 75, chapter 2, MCA

17.8.103 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

(a) 40 CFR Part 50, Appendix B, ~~which contains pertaining to~~ the reference method for the determination of suspended particulate matter in the atmosphere (high-volume method);

(b) 40 CFR Part 50, Appendix J, ~~which contains pertaining to~~ reference methods for the determination of particulate matter as PM-10 in the atmosphere;

(c) 40 CFR Part 51, Appendix M, ~~which sets forth EPA reference emission source test methods for state programs to use in developing and implementing state implementation plans, including alternative methods for testing PM-10 emissions pertaining to recommended test methods for state implementation plans;~~

(d) 40 CFR Part 51, Appendix P, ~~which sets forth pertaining to~~ EPA minimum emission monitoring requirements;

(e) 40 CFR Part 52, subpart BB, ~~which sets forth pertaining to~~ the implementation plan for control of air pollution in Montana;

(f) 40 CFR Part 53, ~~which pertains pertaining to~~ ambient air monitoring reference methods and equivalent methods;

(g) 40 CFR Part 60, Appendix A, ~~which sets forth pertaining to~~ EPA reference emission source reference test methods for stationary sources, ~~including test method 9, which sets forth a method for visual determination of the opacity of emissions from stationary sources;~~

(h) 40 CFR Part 60, Appendix B, ~~which sets forth pertaining to~~ EPA performance specification and test procedures for continuous emission monitoring systems, ~~including performance specification 1, which sets forth specifications and test procedures for opacity continuous emission monitoring systems in stationary sources;~~

(i) 40 CFR Part 61, Appendix B, ~~which sets forth pertaining to~~ EPA reference emission source reference test methods for sources subject to national emission standards for hazardous air pollutants;

(j) 40 CFR Part 63, ~~which sets forth general requirements and pertaining to~~ emission standards for hazardous air pollutant source categories;

~~(k)~~ (o) the Montana Source Testing Protocol and Procedures Manual (July 1994 ed.), ~~which is a department manual setting forth pertaining to~~ sampling and data collection, recording, analysis and transmittal requirements; and

~~(l)~~ (p) the Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I: A Field Guide to Environmental Quality Assurance (EPA-600/R-94/038a, revised April 1994); Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II: Part 1 Ambient Air Quality Monitoring Program Quality System Development (EPA-454/R-98/004, revised August 1998); Quality Assurance Handbook for Air Pollution Measurement Systems, Volume III: Stationary Source Specific Methods (EPA-600/R-94/038c, revised September 1994); and Quality Assurance Handbook for Air Pollution Measurement Systems, Volume

IV: Meteorological Methods (EPA-600/R-94/038d, revised March 1995), ~~which is a federal agency manual and regulations setting forth pertaining to~~ sampling and data collection, recording, analysis and transmittal requirements.

~~(m)~~ (n) section 112(b)(1) of the Federal Clean Air Act (FCAA), as codified in 42 USC 7401, et seq., 7412(b)(1), which contains a list of pertaining to substances designated as hazardous air pollutants;

~~(n)~~ (l) ARM Title 17, chapter 53, subchapter 10, which ~~sets forth the rules, pursuant to section 75-10-405(2)(e) and 75-10-406, MCA, pertaining to boilers or industrial furnaces, pertaining to standards for the management of specific hazardous wastes and specific types of hazardous waste management facilities;~~

~~(o)~~ (m) section 75-10-403(8), MCA, which ~~sets forth pertaining to~~ the statutory definition of "hazardous waste";

~~(p)~~ (k) ARM Title 17, chapter 53, subchapter 5, which ~~sets forth pertaining to the rules pertaining to~~ the identification and listing of hazardous waste;

(2) through (4) remain the same.

AUTH: 75-2-111, MCA

IMP: Title 75, chapter 2, MCA

17.8.106 SOURCE TESTING PROTOCOL (1)~~(a)~~ The requirements of this rule apply to any emission source testing conducted by the department, any source, or any other entity as required by any rule in this chapter, or any permit or order issued pursuant to this chapter, or the provisions of the Montana Clean Air Act of Montana, 75-2-101, et seq., MCA.

(b) through (e) remain the same, but are renumbered (2) through (5).

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, MCA

17.8.110 MALFUNCTIONS (1) remains the same.

(2) The department must be notified promptly by telephone ~~(406-444-3454)~~ whenever a malfunction occurs that is expected to create emissions in excess of any applicable emission limitation, or to continue for a period greater than 4 four hours. If telephone notification is not immediately possible, notification at the beginning of the next working day is acceptable. The notification must include the following information:

(a) through (7) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, MCA

17.8.302 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates herein by reference the following:

~~(a)~~ (d) 40 CFR 81.327, which ~~sets forth pertaining to~~ the

air quality attainment status designations for Montana;

~~(b) (a) 40 CFR Part 60, which pertains pertaining to standards of performance for new stationary sources and modifications, including the final rule published at 65 FR 76378 on December 6, 2000, "Emission Guidelines for Existing Small Municipal Waste Combustion Units", to be codified at 40 CFR Part 60, subpart BBBB;~~

~~(c) (b) 40 CFR Part 61, which pertains pertaining to emission standards for hazardous air pollutants;~~

~~(d) (e) ARM Title 17, chapter 53, subchapter 5, which sets forth the rules pertaining to the identification and listing of hazardous waste; and~~

~~(e) (f) The the Standard Industrial Classification Manual, (1987), executive office of the president, eOffice of mManagement and bBudget, (US government printing office stock number 1987 O-185-718) (PB 87-100012), which sets forth pertaining to a system of industrial classification and definition based upon the composition and structure of the economy; and.~~

~~(f) (c) 40 CFR Part 63, specifying pertaining to emission standards for hazardous air pollutant source categories including the final rules published at 67 FR 16581 on April 5, 2002, "National Emissions Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j)", to be codified at 40 CFR 63, subparts A and B.;~~

(2) through (4) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, MCA

17.8.401 DEFINITIONS ~~For the purposes of~~ In this subchapter, the following definitions apply:

(1) The following apply to the definition of the term "dispersion technique":

(a) ~~"Dispersion technique"~~ means any technique which attempts to affect the concentration of a pollutant in the ambient air by:

(i) through (2)(a) remain the same.

(b) either of the following:

(i) for stacks in existence on January 12, 1979, and for which the owner or operator had obtained all applicable permits or approvals required by this chapter,

$GEP = 2.5H$

if the owner or operator produces evidence that this equation was actually relied on in establishing an emission limitation;

(ii) through (4)(c) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, MCA

17.8.402 REQUIREMENTS (1) The degree of emission limitation required of any source or stack for control of any

air pollutant regulated under the Montana Clean Air Act of Montana ~~must~~ may not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in ARM 17.8.403.

(2) and (3) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-203, MCA

17.8.801 DEFINITIONS ~~For the purpose of~~ In this subchapter, the following definitions apply:

(1)(a) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with ~~(b)~~ (1)(a) through ~~(d)~~ (c) below.

~~(b) through (d) remain the same, but are renumbered (a) through (c).~~

(2) through (2)(c) remain the same.

(3)(a) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable in 40 CFR 81.327 in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than \pm one $\mu\text{g}/\text{m}^3$ (annual average) of the pollutant for which the minor source baseline date is established.

~~(b)~~ (a) Area redesignations under section 7407 107 of the FCAA to attainment or unclassifiable cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(i) and (ii) remain the same.

~~(c)~~ (b) Any baseline area established originally for the total suspended particulate increments shall remain in effect and shall apply for purposes of determining the amount of available PM-10 increments, except that such baseline area shall not remain in effect if the department rescinds the corresponding minor source baseline date in accordance with (21)(d) ~~of this rule.~~

(4)(a) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date.

(a) A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

(i) through (5) remain the same.

(6) "Best available control technology (BACT)" means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the FCAA, excluding hazardous air pollutants except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section 7408(a)(1) 108(a)(1) of the FCAA, which would be emitted from any proposed major stationary source or major modification which the department, on a case-by-case basis, taking into account energy impacts, environmental impacts (including, but not limited to, the effect of the control

technology option on hazardous air pollutants), and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under ARM 17.8.340 and 17.8.341. If the department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, any design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(7) through (19) remain the same.

(20)(a) "Major modification" means any physical change in, or change in the method of operation of, a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA.

(b) through (c)(ii) remain the same, but are renumbered (a) through (b)(ii).

(iii) use of an alternative fuel by reason of an order or rule under section ~~7425~~ 125 of the FCAA;

(iv) through (vii) remain the same.

(21) The following apply to the definitions of the terms "major source baseline date" and "minor source baseline date":

(a) "~~M~~major source baseline date" means:

(i) through (d) remain the same.

(22) The following apply to the definition of the term "major stationary source":

(a) "~~M~~major stationary source" means:

(i) any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA: fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, Portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime

plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(ii) notwithstanding the stationary source size specified in (22)(a)(i) above, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA; or

(iii) through (23) remain the same.

(24) The following apply to the definition of the term "net emissions increase":

(a) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(i) through (26) remain the same.

(27) The following apply to the definition of the term "significant":

(a) remains the same.

(b) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the FCAA, that (27)(a) above does not list, any emissions rate. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ (108)(a)(1) of the FCAA.

(c) Notwithstanding (27)(a) above, "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu\text{g}/\text{m}^3$ (24-hour average).

(28) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the FCAA, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA.

(29) remains the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.802 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

(a) 40 CFR 51.102, ~~which sets forth~~ pertaining to requirements for public hearings for state programs;

~~(b) (c)~~ 40 CFR Part 58, Appendix B, ~~which sets forth~~ pertaining to quality assurance requirements for prevention of significant deterioration air monitoring;

~~(c) (d)~~ 40 CFR Part 60, ~~which sets forth~~ pertaining to standards of performance for new stationary sources;

~~(d) (e)~~ 40 CFR Part 61, ~~which sets forth~~ pertaining to emission standards for hazardous air pollutants;

~~(e) (f)~~ 40 CFR 81.327, ~~which sets forth~~ pertaining to the air quality attainment status designations for Montana; and

~~(f) (g)~~ The the Standard Industrial Classification Manual, (1987), executive office of the president, eOffice of mManagement and bBudget, (US government printing office stock number 1987 O-185-718) (PB 87-100012), which sets forth pertaining to a system of industrial classification and definition based upon the composition and structure of the economy.

~~(g) (b)~~ 40 CFR Part 51, Appendix W, pertaining to the Guidelines on Air Quality Models;

(2) through (5) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) remains the same.

(2) The requirements contained in ARM 17.8.819 through 17.8.827 shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the FCAA that it would emit, except as this subchapter would otherwise allow. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA, or must be considered in the BACT analysis.

(3) through (3)(c)(xxvi) remain the same.

(xxvii) ~~Any~~ other stationary source category which, as of August 7, 1980, is being regulated under section ~~7411~~ 111 or ~~7412~~ 112 of the FCAA.

(4) and (5) remain the same.

(6) The requirements contained in ARM 17.8.820, 17.8.822, and 17.8.824 as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the FCAA from the modification after the application of BACT would be less than 50 tons per year. This does not include hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA.

(7) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.819 CONTROL TECHNOLOGY REVIEW (1) and (2) remain the same.

(3) A major modification shall apply BACT for each pollutant subject to regulation under the FCAA for which it would be a significant net emissions increase at the source, excluding hazardous air pollutants, except to the extent that such hazardous air pollutants are regulated as constituents of more general pollutants listed in section ~~7408(a)(1)~~ 108(a)(1) of the FCAA. In evaluating the environmental impacts of any control technology option, the BACT analysis shall consider all pollutants, including hazardous air pollutants. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) remains the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.821 AIR QUALITY MODELS (1) All estimates of ambient concentrations required under this subchapter must be based on the applicable air quality models, data bases, and other requirements specified in the ~~guideline on air quality models (revised) (1986) (EPA publication 450/278-027R) and supplement A (1987)~~ Guideline on Air Quality Models, 40 CFR Part 51, Appendix W.

(2) Where an air quality impact model specified in the ~~guideline on air quality models (revised) (1986) and supplement A (1987)~~ 40 CFR Part 51, Appendix W are is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific state program. Written approval of the administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures developed in accordance with ARM 17.8.826.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.901 DEFINITIONS ~~For the purposes of~~ In this subchapter the following definitions apply:

(1)(a) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with ~~(b)~~ (1)(a) through ~~(d)~~ (c) below.

(b) remains the same, but is renumbered (a).

~~(c)~~ (b) If the department is unable to determine actual emissions consistent with ~~(b) above~~ (1)(a), the department may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(d) remains the same but is renumbered (c).

(2) through (10) remain the same.

(11)(a) "Major modification" means any physical change in, or change in the method of, operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the FCAA.

(b) through (c)(ii) remain the same, but are renumbered (a) through (b)(ii).

(iii) use of an alternative fuel by reason of an order or rule under section 7425 125 of the FCAA;

(c)(iv) through (vii) remain the same, but are renumbered (b)(iv) through (vii).

(12) The following apply to the definition of the term "major stationary source":

(a) "~~M~~major stationary source" means:

(i) through (b)(xxvi) remain the same.

(xxvii) any other stationary source category which, as of August 7, 1980, is being regulated under sections 7411 111 or 7412 112 of the FCAA.

(13) remains the same.

(14) The following apply to the definition of the term "net emissions increase":

(a) "~~N~~net emissions increase" means the amount by which the sum of the following exceeds zero:

(i) through (20) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.902 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

~~(a) (c) 40 CFR 81.327, which sets forth pertaining to the air quality attainment status designations for Montana;~~

~~(b) (a) 40 CFR Part 60, which sets forth pertaining to standards of performance for new stationary sources;~~

~~(c) (b) 40 CFR Part 61, which sets forth pertaining to emission standards for hazardous air pollutants;~~

~~(d) (e) subchapter I, part D, subpart IV sections 188 through 190 of the Federal Clean Air Act FCAA, as codified in 42 USC 7401 et seq. 7513 through 7513b, which establishes pertaining to additional requirements for particulate matter in nonattainment areas; and~~

~~(e) (d) section 173 of the Federal Clean Air Act FCAA, as codified in 42 USC 7401, et seq. 7503, which establishes pertaining to permit requirements for permit programs in nonattainment areas; and~~

~~(f) The the Standard Industrial Classification Manual, (1987), executive office of the president, eOffice of mManagement and bBudget, (US government printing office stock number 1987 O-185-718) (PB 87-100012), which sets forth pertaining to a system of industrial classification and definition based upon the composition and structure of the economy.~~

(2) through (5) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.905 ADDITIONAL CONDITIONS OF AIR QUALITY PRECONSTRUCTION PERMIT (1) through (1)(b) remain the same.

(c) The new source obtains from existing sources emission reductions (offsets), expressed in tons per year, which provide both a positive net air quality benefit in the affected area in accordance with ARM ~~17.8.906(6) through (8)~~ 17.8.906(7) through (9), and a ratio of required emission offsets to the proposed source's emissions of 1:1 or greater. The emissions reductions (offsets) required under this subsection must be:

(i) through (4) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1002 INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

~~(a) (c)~~ 40 CFR 81.327, which sets forth pertaining to the air quality attainment status designations for Montana;

~~(b) (a)~~ 40 CFR Part 60, which sets forth pertaining to standards of performance for new stationary sources;

~~(c) (b)~~ 40 CFR Part 61, which sets forth pertaining to emission standards for hazardous air pollutants;

~~(d) (e)~~ subchapter I, part D, subpart IV sections 188 through 190 of the Federal Clean Air Act FCAA, as codified in 42 USC 7401, et seq. 7513 through 7513b, which establishes pertaining to additional requirements for particulate matter in nonattainment areas; and

~~(e) (d)~~ section 173 of the Federal Clean Air Act FCAA, as codified in 42 USC 7401, et seq. 7503, which establishes pertaining to permit requirements for permit programs in nonattainment areas; and

~~(f)~~ The the Standard Industrial Classification Manual, (1987), executive office of the president, eOffice of mManagement and bBudget, (US government printing office stock number 1987 O-185-718) (PB 87-100012), which sets forth pertaining to a system of industrial classification and definition based upon the composition and structure of the economy.

(2) through (5) remain the same.

AUTH: 75-2-111, 75-2-203, MCA
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1201 DEFINITIONS ~~As used in In~~ In this subchapter, unless indicated otherwise, the following definitions apply:

(1) through (10)(b) remain the same.

(c) ~~any standard or other requirement under section 7411 111 of the FCAA, including section 7411(d);~~

(d) any ~~standard or other~~ requirement under section 7412 112 of the FCAA, including any requirement concerning accident prevention under section ~~7412(r)(7)~~, 112(r)(7) but excluding the contents of any risk management plan required under section ~~7412(r)~~ 112(r);

(e) remains the same.

(f) any requirements established pursuant to section ~~7661e(b)~~ 504(b) or section ~~7414(a)(3)~~ 114(a)(3) of the FCAA;

(g) any ~~standard or other~~ requirement governing solid waste incineration, under section ~~7429~~ 129 of the FCAA;

(h) any ~~standard or other~~ requirement for consumer and commercial products, under section ~~7511b(e)~~ 183(e) of the FCAA;

(i) any ~~standard or other~~ requirement for tank vessels, under section ~~7511b(f)~~ 183(f) of the FCAA;

(j) remains the same.

(k) any national ambient air quality standard, ~~or~~ increment, or visibility requirement under part C of Title I of the FCAA, but only as it would apply to temporary sources permitted pursuant to section ~~7661e(e)~~ 504(e) of the FCAA; or

(l) through (21) remain the same.

(22) The following apply to the definition of the term "insignificant emissions unit":

(a) "~~I~~nsignificant emissions unit" means any activity or emissions unit located within a source that:

(i) and (ii) remain the same.

(iii) has a potential to emit less than 500 pounds per year of hazardous air pollutants listed pursuant to section ~~7412(b)~~ 112(b) of the FCAA; and

(iv) through (23) remain the same.

(a) A major source under section ~~7412~~ 112 of the FCAA, which is defined as:

(i) for pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year or more of any hazardous air pollutant which has been listed pursuant to section ~~7412(b)~~ 112(b) of the FCAA, 25 tons per year or more of any combination of such hazardous air pollutants, or such lesser quantity as the ~~department~~ board may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station ~~shall~~ are not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) through (b)(xxvi) remain the same.

(xxvii) all other stationary source categories regulated by a standard promulgated under sections ~~7411~~ 111 or ~~7412~~ 112 of the FCAA, but only with respect to those air pollutants that have been regulated for that category.

(c) remains the same.

(24) The following apply to the definition of the term "non-federally enforceable requirement":

(a) "Non-federally enforceable requirement" means, as applicable to emissions units in a source requiring an air quality operating permit, any ~~standard, rule, or other~~ requirement, including any requirement contained in a consent decree, or judicial or administrative order entered into or issued by the department, that is not contained in the Montana state implementation plan approved or promulgated by the administrator through rulemaking under Title I of the FCAA;

(b) remains the same.

(25) through (28)(b) remain the same.

(c) any pollutant that is subject to any standard promulgated under section ~~7411~~ 111 of the FCAA;

(d) remains the same.

(e) any pollutant subject to a ~~standard or other~~ requirement established or promulgated under section ~~7412~~ 112 of the FCAA, including, but not limited to, the following:

(i) any pollutant subject to requirements under section ~~7412(j)~~ 112(j) of the FCAA. If the administrator fails to promulgate a standard by the date established pursuant to section ~~7412(e)~~ 112(e) of the FCAA, any pollutant for which a subject source would be major ~~shall be~~ is considered to be regulated on the date 18 months after the applicable date established pursuant to section ~~7412(e)~~ 112(e) of the FCAA; and

(ii) any pollutant for which the requirements of section ~~7412(g)(2)~~ 112(g)(2) of the FCAA have been met, but only with respect to the individual source subject to the section ~~7412(g)(2)~~ 112(g)(2) requirement.

(29) "Responsible official" means one of the following:

(a) For a corporation:

(i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function;

(ii) ~~or~~ any other person who performs similar policy or decision-making functions for the corporation; or

(iii) a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) ~~(A)~~ (A) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars); or

(ii) ~~(B)~~ (B) the delegation of authority to such representative is approved in advance by the department.

(b) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.

(c) For a municipality, state, federal, or other public agency: ~~either a principal executive officer or~~

(i) ~~a ranking elected official;~~ or

(ii) ~~a principal executive officer.~~ For the purposes of this part, a A principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of the environmental protection agency).

(d) For affected sources, the designated representative

~~in so far as concerning~~ actions, standards, requirements, or prohibitions under Title IV of the FCAA or the regulations promulgated thereunder are concerned, and the designated representative for any other purposes under this subchapter.

(30) through (32) remain the same.

(33) "Stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section ~~7412(b)~~ 112(b) of the FCAA.

AUTH: 75-2-217, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1202 INCORPORATIONS BY REFERENCE (1) For the purposes of this subchapter, the board hereby adopts and incorporates by reference the following:

~~(a) (g) the Standard Industrial Classification Manual, (1987), executive office of the president, eOffice of mManagement and bBudget, (US government printing office stock number 1987 O-185-718) (PB 87-100012), which sets forth pertaining to a system of industrial classification and definition based upon the composition and structure of the economy.~~

~~(b) (a) 40 CFR 70.3, which sets forth pertaining to those sources and source categories designated by the administrator as requiring an operating permit pursuant to Title V of the FCAA;~~

~~(c) (f) 42 USC 7429(g), which defines section 129(g) of the FCAA as codified in 42 USC 7429(g), pertaining to the definition of solid waste incineration unit for the purposes of Title V of the FCAA; and~~

~~(d) (e) 42 USC 7429(e), which describes those section 129(e) of the FCAA as codified in 42 USC 7429(e), pertaining to solid waste incineration units that are required to obtain operating permits under Title V of the FCAA;~~

~~(e) (b) 40 CFR Part 72, which describes pertaining to the operating permit requirements for acid rain sources subject to Title IV of the FCAA;~~

~~(f) (c) 40 CFR Part 75, which describes pertaining to the continuous emission monitoring requirements for acid rain sources subject to Title IV of the FCAA; and~~

~~(g) (d) 40 CFR Part 76, which describes pertaining to the nitrogen oxides emission reduction requirements for acid rain sources subject to Title IV of the FCAA.~~

(2) through (5) remain the same.

AUTH: 75-2-217, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1204 AIR QUALITY OPERATING PERMIT PROGRAM APPLICABILITY (1) The requirements of this subchapter apply to the following sources:

(a) remains the same.

(b) any source, including an area source, subject to a ~~standard, limitation, or other~~ requirement under section 7411

111 of the FCAA;

(c) any source, including an area source, subject to a ~~standard or other~~ requirement under section ~~7412~~ 112 of the FCAA, except that a source is not required to obtain a permit solely because it is subject to ~~regulations or~~ requirements under section ~~7412(r)~~ 112(r) of the FCAA;

(d) remains the same.

(e) any source required to obtain a permit under section ~~7429(e)~~ 129(e) of the FCAA;

(f) through (2)(b) remain the same.

(c) All sources listed in (1) ~~above~~ that are not major or affected sources, or that are solid waste incineration units as defined in section ~~7429(g)~~ 129(g) of the FCAA that are not required to obtain a permit pursuant to section ~~7429(e)~~ 129(g).

(3) through (7) remain the same.

AUTH: 75-2-217, MCA

IMP: 75-2-217, MCA

17.8.1206 INFORMATION REQUIRED FOR AIR QUALITY OPERATING PERMIT APPLICATIONS (1) through (5)(h) remain the same.

(i) other information related to emissions as required by any applicable requirement (including information related to stack height limitations developed pursuant to section ~~7423~~ 123 of the FCAA) or this chapter (including the location of emission units, flow rate, building dimensions, and stack parameters such as height, diameter, and temperature);

(j) through (p) remain the same.

(q) a certification of compliance with all applicable requirements by a responsible official consistent with ARM 17.8.1207 and section ~~7414(a)(3)~~ 114(a)(3) of the FCAA;

(r) through (11) remain the same.

AUTH: 75-2-217, 75-2-218, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1212 REQUIREMENTS FOR AIR QUALITY OPERATING PERMIT CONTENT RELATING TO MONITORING, RECORDKEEPING, AND REPORTING

(1) Each air quality operating permit shall contain the following requirements with respect to monitoring:

(a) All monitoring and analysis procedures or test methods required under the applicable monitoring and testing requirements, including ARM 17.8.1501 through 17.8.1514 and any other procedures and methods that may be promulgated pursuant to sections ~~7661e(b)~~ 504(b) or ~~7414(a)(3)~~ 114(a)(3) of the FCAA. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions ~~provided if~~ the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;

(b) through (4) remain the same.

AUTH: 75-2-217, 75-2-218, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1213 REQUIREMENTS FOR AIR QUALITY OPERATING PERMIT CONTENT RELATING TO COMPLIANCE (1) through (7)(c)(i) remain the same.

(ii) the identification of the method(s) or other means used by the owner or operator for determining the status of compliance with each term and condition during the certification period, and whether such methods or other means provide continuous or intermittent data. Such methods and other means shall include, at a minimum, the methods and means required under ARM 17.8.1212. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 7413(e)(2) 113(c)(2) of the FCAA, which prohibits knowingly making a false certification or omitting material information;

(iii) through (d) remain the same.

AUTH: 75-2-217, 75-2-218, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1214 REQUIREMENTS FOR AIR QUALITY OPERATING PERMIT CONTENT RELATING TO THE PERMIT SHIELD AND EMERGENCIES

(1) through (3) remain the same.

(4) Nothing in (1), (2) or (3) ~~of this rule~~, or in any air quality operating permit shall alter or affects the following:

(a) the provisions of section 7603 303 of the FCAA, including the authority of the administrator under that section;

(b) remains the same.

(c) the applicable requirements of the acid rain program, consistent with section 7651g(a) 408(a) of the FCAA;

(d) the ability of the administrator to obtain information from a source pursuant to section 7414 114 of the FCAA;

(e) through (8) remain the same.

AUTH: 75-2-217, 75-2-218, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1220 AIR QUALITY OPERATING PERMIT ISSUANCE, RENEWAL, REOPENING AND MODIFICATION (1) through (3) remain the same.

(4) Within nine months after receiving a complete application, ~~The the~~ department shall take final action on a an ~~complete~~ air quality operating permit application containing an early reduction demonstration that has been approved by the administrator under section 7412(i)(5) 112(i)(5) of the FCAA ~~within 9 months of receiving a complete application.~~

(5) through (13) remain the same.

AUTH: 75-2-217, 75-2-218, MCA

IMP: 75-2-217, 75-2-218, MCA

17.8.1224 ADDITIONAL REQUIREMENTS FOR OPERATIONAL FLEXIBILITY AND AIR QUALITY OPERATING PERMIT CHANGES THAT DO NOT REQUIRE REVISIONS (1) through (7)(c) remain the same.

(d) any change that is a modification or reconstruction under sections ~~7410~~ 110, ~~7411~~ 111, or ~~7412~~ 112 of the FCAA; or
(e) remains the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, 75-2-218, MCA

17.8.1226 ADDITIONAL REQUIREMENTS FOR MINOR AIR QUALITY OPERATING PERMIT MODIFICATIONS (1) through (1)(f) remain the same.

(g) do not seek to establish or change a permit term ~~or condition~~ for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms ~~and conditions~~ include a federally enforceable emissions cap assumed to avoid classification as a modification under ~~any provision of~~ Title I of the FCAA, and an alternative emissions limit approved pursuant to regulations promulgated under section ~~7412(i)(5)~~ 112(i)(5) of the FCAA.

(2) through (12) remain the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, MCA

17.8.1232 PUBLIC PARTICIPATION (1) through (1)(d) remain the same.

(2) The department shall keep a record of both the commenters and the issues raised during the public participation process so that the administrator may fulfill the obligation under section ~~7661d(b)(2)~~ 505(b)(2) of the FCAA to determine whether a citizen petition may be granted, and such records shall be available to the public.

(3) remains the same.

AUTH: 75-2-217, MCA
IMP: 75-2-217, 75-2-218, MCA

REASON: Several of the proposed amendments would revise the numbering of rules to delete the "double earmarks" in the current numbering. This is necessary to conform the numbering of the rules to the current rule numbering style of the Secretary of State's office.

The proposed amendments to ARM 17.8.101 would update federal citations, make minor clerical amendments, and eliminate the duplication of statutory language in definitions by citing to the definitions in the statute.

The proposed amendments to ARM 17.8.102 would adopt revisions to the federal air quality regulations that are incorporated by reference in the Montana air quality rules. These revisions were published in the Federal Register between July 1, 2001, and June 30, 2002, and are included in the July 1, 2002, edition of the Code of Federal Regulations (CFR). The proposed amendments to ARM 17.8.102 are necessary to update the incorporations by reference in the air quality rules to

incorporate the most recent editions of the CFR and the Administrative Rules of Montana. These proposed amendments are necessary to allow the Department of Environmental Quality to follow the most recent editions. Also, incorporation of recent revisions to federal regulations incorporated by reference in the Montana air quality rules is necessary for the State to retain primacy over Montana's air quality program.

The proposed amendments to ARM 17.8.103, 17.8.802, 17.8.902, 17.8.1002 and 17.8.1202 would revise these rules to update citations, make the wording consistent throughout, and change the order of subsections to a more logical sequence.

The proposed amendments to ARM 17.8.106 would correct "double earmarking" and make a minor clerical amendment.

The proposed amendment to ARM 17.8.110 would delete a reference to a department telephone number that is no longer correct. Future changes to the telephone number would not necessitate a rule change if the number is omitted from the rule. Double earmarkings in this section will be proposed for elimination in another rulemaking.

The proposed amendments to ARM 17.8.302 would delete the reference to the specified Federal Register notice for revisions to the general provisions of the national emission standards for hazardous air pollutants (NESHAP) and the development of maximum achievable control technology (MACT) emission limits. The Environmental Protection Agency (EPA) has now codified those standards in the CFR so that the Board's proposed incorporation by reference of the most recent edition of the CFR would include those regulations. The proposed amendments also would update citations and conform the wording to other rules.

The proposed amendments to ARM 17.8.401 would make minor clerical changes and would correct double earmarking.

The proposed amendment to ARM 17.8.402 would make a minor clerical change.

The proposed amendments to ARM 17.8.801 and 17.8.901 would correct double earmarking and update citations.

The proposed amendments to ARM 17.8.818, 17.8.819 and 17.8.821 would update citations.

The proposed amendment to ARM 17.8.905 would correct an internal citation.

The proposed amendments to ARM 17.8.1201 would make minor clerical changes, would correct double earmarking and would update citations.

The proposed amendments to ARM 17.8.1204, 17.8.1206, 17.8.1213, 17.8.1214, 17.8.1220, 17.8.1224, 17.8.1226 and 17.8.1232 would update citations.

The proposed amendments to ARM 17.8.1212 would update citations and correct a typographical error.

The Board will also take testimony on submission of the proposed amendments to EPA as proposed revisions to the State Implementation Plan (SIP).

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board

Secretary at Board of Environmental Review, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana, 59620-0901; faxed to (406) 444-4386; or emailed to ber@state.mt.us, no later than 5:00 p.m., February 5, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Thomas Bowe, attorney for the Board, has been designated to preside over and conduct the hearing.

6. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board Secretary at Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; emailed to ber@state.mt.us, or may be made by completing a request form at any rules hearing held by the Board.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

BY: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.,
Chairman

Reviewed by:

David Rusoff
David Rusoff, Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption)	AMENDED NOTICE OF PUBLIC
of New Rules I through IV,)	HEARING ON PROPOSED
pertaining to standards for)	ADOPTION AND AMENDMENT
electrical conductivity and)	
sodium adsorption ratio and)	
classifications for)	(WATER QUALITY)
constructed coal bed methane)	
water holding ponds, and the)	
amendment of ARM 17.30.602,)	
17.30.706 and 17.30.715)	
pertaining to definitions for)	
water quality standards,)	
informational requirements for)	
nondegradation significance/)	
authorization review and)	
nonsignificance criteria)	

TO: All Concerned Persons

1. On August 29, 2002, the Board of Environmental Review published notices of public hearing at pages 2262, 2269 and 2280, 2002 Montana Administrative Register, Issue Number 16, under MAR Notice No. 17-170, MAR Notice No. 17-171 and MAR Notice No. 17-172, to consider the proposed adoption of New Rules I through III and the amendment of ARM 17.30.602 and 17.30.715. The Board held those hearings and is publishing this amended notice to address comments that were received at those hearings and to institute a further comment period on the department's recommended proposal set forth in MAR Notice No. 17-171. The Board is amending MAR Notice No. 17-171 to include provisions that specify flow-based procedures for implementing the numeric standards in New Rule IV and to include provisions requiring persons planning to discharge coal bed methane water to apply to the department for a significance determination. Except for New Rule I in MAR Notice No. 17-171, all rules in that notice remain part of this rulemaking proceeding.

2. On January 31, 2003, at 11:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of New Rule IV Numeric Standards for Electrical Conductivity (EC) and Sodium Adsorption Ratio (SAR), and the amendment of ARM 17.30.706 Informational Requirements for Nondegradation Significance/Authorization Review, and to consider any other comments pertaining to MAR Notice No. 17-171.

3. The Board will make reasonable accommodations for persons with disabilities who wish to participate in these public hearings or need an alternative accessible format of

this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., January 21, 2003, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386 or email ber@state.mt.us.

4. The Board is proposing two Alternatives for New Rule IV. Both of the alternatives include a provision that specifies flow-based procedures for implementing the numeric standards. The second alternative also includes a non-severability provision that specifies that the nondegradation requirements for EC and SAR and the flow-based procedures for implementing those requirements are non-severable from the numeric standards. In order to ensure that the nondegradation provisions are non-severable from the numeric standards and flow-based procedures, Alternative II also includes the Board's proposed nonsignificance criteria for EC and SAR, as published in the amendment of ARM 17.30.715 in MAR Notice No. 17-171.

ALTERNATIVE I

RULE IV NUMERIC STANDARDS FOR ELECTRICAL CONDUCTIVITY (EC) AND SODIUM ADSORPTION RATIO (SAR) (1) No person may violate the numeric water quality standards identified in (2) through (5). Compliance with the standards contained in (2) through (5) will be determined according to the procedures specified in (6).

(2) Except as provided in [New Rule III], the numeric standards for electrical conductivity (EC) and sodium adsorption ratio (SAR) for the mainstems of Rosebud Creek, the Tongue, Powder, and Little Powder rivers from November 1 through March 1 are as follows:

(a) for Rosebud Creek and the Tongue River, the numeric water quality standard for EC is 2000 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 1000 through 2000 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 3.0 through 5.0]; and

(b) for the Powder River and the Little Powder River, the numeric water quality standard for EC is 2500 $\mu\text{S}/\text{cm}$ and the numeric water quality standard for SAR is 7.5 [or an alternative value in the range of 6.0 through 7.5].

(3) Except as provided in [New Rule III], the numeric standards for EC and SAR for the mainstems of Rosebud Creek, the Tongue, Powder, and Little Powder rivers from March 2 through October 31 are as follows:

(a) for Rosebud Creek and the Tongue River, the numeric water quality standard for EC is 1000 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 1000 through 1500 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 3.5 (or an alternative value in the range of 3.0 through 5.0); and

(b) for the Powder River and Little Powder River, the numeric water quality standard for EC is 2000 $\mu\text{S}/\text{cm}$ [or an

alternative value in the range of 1600 through 2000 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 4.0 through 6.0].

(4) Except as provided in [New Rule III], for all tributaries and other surface waters in the Rosebud Creek, Tongue, Powder, and Little Powder river watersheds, the numeric water quality standard for EC is 500 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 500 through 2500 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 3.0 through 7.5].

(5) All of the standards listed in (2) through (4) apply as an average value for each month [or as an instantaneous value].

(6) For purposes of determining compliance with the water quality standards and nonsignificance criteria for all parameters of concern in any new or increased discharge of unaltered ground water from coal bed methane development, the department shall determine effluent or compliance limits (e.g., evaluate the design of disposal systems) by using a flow-based analysis that considers a range of flows or monthly flow probability. With respect to EC and SAR, the department shall also use the median chemistry for the specified flow range or monthly flow.

AUTH: 75-5-301, 75-5-303, MCA
IMP: 75-5-301, 75-5-303, MCA

ALTERNATIVE II

RULE IV NUMERIC STANDARDS FOR ELECTRICAL CONDUCTIVITY (EC) AND SODIUM ADSORPTION RATIO (SAR) (1) No person may violate the numeric water quality standards or the criteria for determining nonsignificant changes in water quality identified in (2) through (6). Compliance with the standards and criteria contained in (2) through (6) will be determined according to the procedures specified in (7).

(2) Except as provided in [New Rule III], the numeric standards for electrical conductivity (EC) and sodium adsorption ratio (SAR) for the mainstems of Rosebud Creek, the Tongue, Powder, and Little Powder rivers from November 1 through March 1 are as follows:

(a) for Rosebud Creek and the Tongue River, the numeric water quality standard for EC is 2000 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 1000 through 2000 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 3.0 through 5.0]; and

(b) for the Powder River and the Little Powder River, the numeric water quality standard for EC is 2500 $\mu\text{S}/\text{cm}$ and the numeric water quality standard for SAR is 7.5 [or an alternative value in the range of 6.0 through 7.5].

(3) Except as provided in [New Rule III], the numeric standards for EC and SAR for the mainstems of Rosebud Creek, the Tongue, Powder, and Little Powder rivers from March 2 through October 31 are as follows:

(a) for Rosebud Creek and the Tongue River, the numeric water quality standard for EC is 1000 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 1000 through 1500 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 3.5 [or an alternative value in the range of 3.0 through 5.0]; and

(b) for the Powder River and Little Powder River, the numeric water quality standard for EC is 2000 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 1600 through 2000 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 4.0 through 6.0].

(4) Except as provided in [New Rule III], for all tributaries and other surface waters in the Rosebud Creek, Tongue, Powder, and Little Powder river watersheds, the numeric water quality standard for EC is 500 $\mu\text{S}/\text{cm}$ [or an alternative value in the range of 500 through 2500 $\mu\text{S}/\text{cm}$] and the numeric water quality standard for SAR is 5.0 [or an alternative value in the range of 3.0 through 7.5].

(5) All of the standards listed in (2) through (4) apply as an average value for each month [or as an instantaneous value].

(6) Changes in existing surface or ground water quality with respect to EC and SAR are nonsignificant according to the criteria in 75-5-301(5)(c), MCA, provided that the change will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.

(7) For purposes of determining compliance with the water quality standards and nonsignificance criteria for all parameters of concern in any new or increased discharge of unaltered ground water from coal bed methane development, the department shall determine effluent or compliance limits (e.g., evaluate the design of disposal systems) by using a flow-based analysis that considers a range of flows or monthly flow probability. With respect to EC and SAR, the department shall also use the median chemistry for the specified flow range or monthly flow.

(8) If any of the provisions of (6) or (7), or both of them, are declared to be invalid, then the numeric water quality standards and requirements specified in (1) through (7) shall be void.

AUTH: 75-5-301, 75-5-303, MCA

IMP: 75-5-301, 75-5-303, MCA

REASON: In this amended notice, the Board is proposing New Rule IV as a substitute for New Rule I published in MAR Notice No. 17-171. The numeric standards for EC and SAR proposed in New Rule IV include the standards recommended by the department, as refined by public comment, and also include a range of standards that have been promoted by other interested persons who participated in a collaborative effort to reach agreement on the proposed standards. The Board is seeking comment on whether or not to adopt the numeric standards recommended by the department or, alternatively,

whether to adopt a different numeric standard that is within the range of standards set forth in brackets in (2) through (4) in New Rule IV.

The department's recommended standards in New Rule IV have been modified from those originally recommended by the department in MAR Notice No. 17-171 as follows:

1. The water quality standards for EC and SAR that apply during the irrigation season now apply during the month of March as well, because irrigation often occurs in March, especially in the tributaries.

2. The EC standard for the Powder River during the irrigation season has been raised from 1900 to 2000 $\mu\text{S}/\text{cm}$. For the non-irrigation season, the EC standard has been raised from 2000 to 2500 $\mu\text{S}/\text{cm}$ and the SAR standard has been raised from 5.0 to 7.5. These increases in the standards more nearly reflect natural conditions and do not increase the impacts to irrigated agriculture.

3. The use of a formula to derive a standard for SAR has been omitted because the formula had limited value due to its inapplicability to many of the streams included in the rule proposal. Instead, the department is recommending a specific SAR value for each of the streams specified in New Rule IV.

Rationale for the Numeric Standards Recommended by the Department in New Rule IV

The EC standard of 1000 $\mu\text{S}/\text{cm}$ for the Tongue River and Rosebud Creek during the irrigation season is established at a level that will prevent reductions in the yield of field beans. Field beans are the most sensitive crops grown in these watersheds. The value of 1000 $\mu\text{S}/\text{cm}$ takes into account the rainfall in the basin and the current leaching fraction of 15 percent.

The EC standard of 2000 $\mu\text{S}/\text{cm}$ for the Powder and Little Powder Rivers during the irrigation season is established at a level that will prevent reductions in the yield of field corn and alfalfa. These are the most sensitive crops grown in these watersheds. The value of 2000 $\mu\text{S}/\text{cm}$ takes into account the rainfall in the basin and the current leaching fraction of 30 percent.

The EC standard of 2000 $\mu\text{S}/\text{cm}$ for Tongue River and Rosebud Creek during the non-irrigation season is established at a level that will minimize the potential for damage to riparian vegetation and to aquatic life.

The EC standard of 2500 $\mu\text{S}/\text{cm}$ for the Powder and Little Powder Rivers during the non-irrigation season is established at a level that will minimize the potential for damage to riparian vegetation and to aquatic life. This standard is higher than the non-irrigation season standard for the Tongue River and Rosebud Creek, because the ambient levels in the Powder and Little Powder Rivers are usually at or above 2000 $\mu\text{S}/\text{cm}$.

The SAR standard of 3.5 for the Tongue River and Rosebud Creek for the irrigation season is established at a level that

will prevent reductions in infiltration. This is the highest value of SAR that will not result in a reduction in infiltration when the EC of the irrigation water is 1000 $\mu\text{S}/\text{cm}$ and the soils have equilibrated to irrigation water with an EC of 1000 $\mu\text{S}/\text{cm}$ and an SAR of 3.5.

The SAR standard of 5.0 for the Powder and Little Powder Rivers for the irrigation season is established at a level that will minimize the potential for reductions in infiltration due to rainfall effects when the soils have equilibrated to irrigation water with an EC of 2000 $\mu\text{S}/\text{cm}$ and an SAR of 5.0.

The SAR standard of 5.0 for the Tongue River and Rosebud Creek during the non-irrigation season is established at a level that will minimize the potential for damage to riparian soils.

The SAR standard of 7.5 for the Powder and Little Powder Rivers during the non-irrigation season is established at a level that will minimize the potential for damage to riparian soils.

The EC standard of 500 $\mu\text{S}/\text{cm}$ for the tributaries is established at a level that will prevent reductions in the yield of alfalfa when the water-spreading method of irrigation is used.

The SAR standard of 5.0 for the tributaries is established at a level that will minimize the potential for reductions in infiltration due to rainfall effects when the water-spreading method of irrigation is used.

Reason for the Flow-Based Procedures

The Board is proposing a provision that requires the department to use a flow-based analysis when evaluating compliance with the water quality standards and nonsignificance criteria for all parameters of concern in any new or increased discharge from coal bed methane development. [See New Rule IV section (6) in Alternative I and section (7) in Alternative II.] The Board is proposing the use of a flow-based analysis because a flow-based approach will allow increased discharges during periods of high flow, while still protecting uses. If the Board does not adopt this provision, the department typically evaluates and restricts discharges based upon the lowest flow that occurs for 7 consecutive days every 10 years (7Q10). The Board does not believe that restricting discharges of water from coal bed methane development to the most restrictive year-round limit imposed by the 7Q10 is appropriate since this restriction may preclude discharges that could occur during high flow without harming uses. Since the primary objective of the Board is to prevent harm to designated uses, the Board is proposing to adopt a flow-based analysis that will protect uses while allowing increased discharges from coal bed methane.

Reason for a Non-Severability Clause [Alternative II]

The Board is including a non-severability clause in New Rule IV [Alternative II], to require that the adoption of numeric criteria, nondegradation criteria, and a flow-based analysis for discharges of coal bed methane water not be effective unless all components of the rule remain in place. Under Alternative II, the Board would not amend ARM 17.30.715(1)(g) to address nonsignificance criteria for EC and SAR as originally proposed in MAR Notice No. 17-171, but would adopt the nonsignificance criteria for EC and SAR in New Rule IV(6) [Alternative II].

Under (8) of New Rule IV [Alternative II], the Board is proposing that, if the nondegradation criteria in (6) [Alternative II] or the flow-based analysis in (7) [Alternative II] are later declared invalid, then the entire provisions of New Rule IV [Alternative II] shall be void. Since the primary objective of the Board is to establish numeric standards for EC and SAR that protect existing and designated uses without unduly restricting coal bed methane development, the Board is concerned that a court's decision to invalidate, for example, the nondegradation criteria would result in numeric nondegradation thresholds that are not necessary for the protection of designated uses and that unnecessarily restrict coal bed methane development. Rather than have that result, the Board is proposing to void the entire Rule IV [Alternative II].

5. The rule proposed to be amended provides as follows, deleted matter interlined, new matter underlined:

17.30.706 INFORMATIONAL REQUIREMENTS FOR NONDEGRADATION SIGNIFICANCE/AUTHORIZATION REVIEW (1) Any person proposing an activity ~~which~~ that may cause degradation is responsible for compliance with 75-5-303, MCA. Except as provided in (2) ~~and (3) of this rule~~, a person may either:

(a) remains the same.

(b) submit an application to the department pursuant to ~~(3) (4) of this rule~~, for the department to make the determination.

(2) remains the same.

(3) Any person proposing to discharge unaltered ground water into surface or ground water for purposes of developing coal bed methane must complete a department "Application for Determination of Significance", as described in (4). The department shall review the application and determine whether the discharge is nonsignificant according to criteria established by the board. If the department determines that the discharge is nonsignificant, the department shall issue a "Determination of Nonsignificance", which must include any conditions or limitations on the discharge that are reasonably necessary to ensure compliance with its determination. No person may violate the conditions or limitations included in the department's "Determination of Nonsignificance" and any

violation of those conditions or limitations constitutes degradation in violation of 75-5-605(1)(d), MCA.

~~(3)~~ (4) Any person proposing an activity or class of activities which that may cause degradation and is not an activity included under (2) or (3) ~~of this rule~~ may complete a department "Application for Determination of Significance". Information required on the application includes, but is not limited to, the following:

(a) through (e) remain the same.

~~(4)~~ (5) The department will review the an "Application for Determination of Significance" and make a determination whether the proposed change in water quality is nonsignificant according to ARM 17.30.715 or 17.30.716 within 60 days of receipt of the completed application.

(5) through (13) remain the same, but are renumbered (6) through (14).

AUTH: 75-5-301, 75-5-303, MCA

IMP: 75-5-303, MCA

REASON: The Board is proposing the amendment of ARM 17.30.706 in response to a ruling by U.S. District Judge Sam E. Haddon on August 23, 2002. (Northern Plains Resource Council v. Redstone Gas Partners, CV 00-105-BLG-SEH). In that case, the court found that unaltered ground water discharged as a result of coal bed methane development is not a "pollutant" as that term is defined under the federal Clean Water Act (CWA). Since the court found that unaltered ground water is not a pollutant, the court went on to hold that discharges from coal bed methane development do not require an NPDES permit under the CWA. The court further explained that its holding applied with equal force to Montana's federally delegated MPDES permit program. This ruling is currently being appealed.

Since the district court ruling eliminates the department's authority to require an MPDES permit for coal bed methane water, the Board is proposing the amendment of ARM 17.30.706 as an alternative method of ensuring compliance with state water quality standards and nondegradation requirements. The amendments being proposed would require persons proposing to discharge water resulting from coal bed methane development to apply to the department for its determination of whether or not the proposed discharge is nonsignificant according to the criteria adopted by the Board. The amendment also clarifies the department's authority to impose limits or conditions on discharges of coal bed methane to ensure that all water quality standards, including the nondegradation requirements, are met. If the Board does not adopt the amendments to ARM 17.30.706, the department would have no authority to review and impose conditions on proposed discharges of coal bed methane water to ensure compliance with state water quality requirements.

6. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@state.mt.us and must be received no later than 5:00 p.m., February 7, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@state.mt.us or may be made by completing a request form at any rules hearing held by the Board.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

John F. North
John F. North, Rule Reviewer

Certified to the Secretary of State, December 16, 2002.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of) NOTICE OF PUBLIC HEARING ON
New Rules I through XI) PROPOSED ADOPTION
pertaining to an alternative)
energy revolving loan program) (ALTERNATIVE ENERGY)

TO: All Concerned Persons

1. On January 17, 2003, at 10:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 239 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., January 6, 2002, to advise us of the nature of the accommodation that you need. Please contact Kathi Montgomery, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-6778; fax (406) 444-6836; or email kmontgomery@state.mt.us.

3. The proposed new rules provide as follows:

NEW RULE I POLICY AND PURPOSE OF RULES (1) Title 75, chapter 25, part 1, MCA, establishes a revolving loan program administered by the department for the purpose of increasing the number of alternative energy systems installed in Montana homes and small businesses that generate energy for their own use, either off-grid or grid-connected. This subchapter provides criteria and guidelines to aid the department in implementing the law, defines eligibility criteria, identifies the processes and procedures for disbursing loans, and prescribes the terms and conditions for making loans, including repayment schedules and interest.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: The rules proposed in this notice will implement Montana's alternative energy system revolving loan program. The program was created by the 2001 Montana legislature, and the authorizing statutes are codified at Title 75, chapter 25, part 1, MCA. The loan program, which will be administered by the Department of Environmental Quality, will provide loans to individuals and small businesses for the purpose of building alternative energy systems. The loan program is designed to stimulate the demand for alternative energy systems in the state and to supply a portion of the state's energy needs with renewable resources. The system design and installation work will also create a pool of experienced installers and equipment

suppliers, which will lower future equipment prices. The program is necessary to help meet the state's goal of reducing its reliance on nonrenewable energy sources.

New rule I sets out the policy and purpose of the new rules, and is necessary to provide guidance about the correct application of the rules.

NEW RULE II DEFINITIONS Unless the context requires otherwise, as used in this subchapter:

(1) "Act" means the alternative energy revolving loan statutes set out in Title 75, chapter 25, part 1, MCA.

(2) "Alternative energy system", as defined in 15-32-102, MCA, means the generation system or equipment used to convert energy sources into usable sources using fuel cells that do not require hydrocarbon fuel, geothermal systems, low emission wood or biomass, wind, photovoltaics, geothermal, small hydropower plants under one megawatt, and other recognized nonfossil forms of energy generation.

(3) "Customer-generator", as defined in 69-8-103, MCA, means a user of a net metering system.

(4) "Department" means the Montana department of environmental quality established by 2-15-3501, MCA.

(5) "Geothermal system" means a system that transfers energy either from the ground, by way of a closed loop, or from ground water, by way of an open loop, for the purpose of heating or cooling a residential building or small business.

(6) "Low emission wood or biomass combustion device", as defined in 15-32-102, MCA, means a noncatalytic stove or furnace that:

(a) is specifically designed to burn wood pellets or other nonfossil biomass pellets; and

(i) has a particulate emission rate of less than 4.1 grams per hour when tested in conformance with the standard method for measuring the emissions and efficiencies of residential wood stoves, as adopted by the department pursuant to 15-32-203, MCA; or

(ii) has an air-to-fuel ratio of 35 to 1 or greater when tested in conformance with the standard method for measuring the air-to-fuel ratio and minimum achievable burn rates for wood-fired appliances, as adopted by the department pursuant to 15-32-203, MCA; or

(b) burns wood or other nonfossil biomass and has a particulate emission rate of less than 4.1 grams per hour when tested in conformance with the standard method for measuring the emissions and efficiencies of residential wood stoves, as adopted by the department pursuant to 15-32-203, MCA.

(7) "Net metering", as defined in 69-8-103, MCA, means measuring the difference between the electricity distributed to and the electricity generated by a customer-generator that is fed back to the distribution system during the applicable billing period.

(8) "Net metering system", as defined in 69-8-103, MCA, means a facility for the production of electrical energy that:

(a) uses as its fuel solar, wind, or hydropower;

- (b) has a generating capacity of not more than 50 kilowatts;
 - (c) is located on the customer-generator's premises;
 - (d) operates in parallel with the distribution services provider's distribution facilities; and
 - (e) is intended primarily to offset part or all of the customer-generator's requirements for electricity.
- (8) "Recognized nonfossil forms of energy generation", as defined in 15-32-102, MCA, means:
- (a) a system that captures energy or converts energy sources into usable sources, including electricity, by using:
 - (i) solar energy, including passive solar systems;
 - (ii) wind;
 - (iii) solid waste;
 - (iv) the decomposition of organic wastes;
 - (v) geothermal;
 - (vi) fuel cells that do not require hydrocarbon fuel; or
 - (vii) an alternative energy system;
 - (b) a system that produces electric power from biomass or solid wood wastes; or
 - (c) a small system that uses water power by means of an impoundment that is not over 20 acres in surface area.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule II defines the terms that have special meanings within these rules and within the energy and renewables industries. The definitions are necessary to inform loan applicants of the meanings of key terms and concepts in the loan review and approval process. Although some of the definitions in the rule repeat those in applicable statutes, the repetition is necessary in order to consolidate the definitions for easy access by loan applicants.

NEW RULE III ELIGIBLE PROJECTS (1) The department shall fund projects that the department determines will best enable the state to meet the legislative mandate to reduce reliance on nonrenewable energy sources.

(2) To be eligible for funding, a project or portion of a project must be:

- (a) conducted within Montana;
- (b) technically appropriate for Montana's climate and available generation resources; and
- (c) directly related to the construction or installation of alternative energy systems that generate energy through proven methodology for the sole use of the customer-generator or for net metering in a residence or small business.

(3) Projects designed to produce electricity for sale to third persons are not eligible for funding.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule III sets out criteria that projects must meet to be eligible for funding under the alternative energy system loan program. The criteria are designed to ensure that funding goes to technically appropriate projects that serve residences or small businesses. This rule is necessary to clarify the eligibility criteria that the department will use for funding, and to inform loan applicants of which projects are and are not eligible.

NEW RULE IV ELIGIBLE APPLICANTS (1) Any person may apply for a loan to fund a project under the Act and these rules, except for the following and their immediate families:

- (a) department employees whose duties are related to conservation or alternative energy; and
- (b) department contractors working on conservation or alternative energy projects.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule IV identifies persons who are not eligible for loans under the alternative energy system loan program. The rule is intended to prevent conflicts of interest in the loan review and issuance process. The rule is necessary to define who may and who may not receive loans through the program.

NEW RULE V SIZE OF AWARDS (1) The maximum amount of money that the department may loan for a single project or applicant is \$10,000.

(2) The minimum amount of money that the department may loan for a single project or applicant is \$2,000.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule V identifies the minimum and maximum amounts that the department may loan through this program. The maximum amount is set by statute. The minimum amount is intended to limit the percentage of administrative costs per loan. By statute, administrative costs may not exceed 10% of total loans. The minimum amount will also make loans more attractive to participation by financial contractors, since the interest rate for loans will include a percentage for the participating financial institution. This rule is necessary to inform potential applicants of the financial limits of loans.

NEW RULE VI APPLICATION PROCEDURE (1) An applicant shall submit an application on forms prescribed and made available by the department. An applicant shall submit two copies of the application to the department at the time of filing, and shall provide additional copies as requested by the department.

(2) An applicant shall submit additional or supplemental material as requested by the department.

(3) An applicant may revise an application after the application is formally filed, but before the department issues a decision on the application by submitting a revision to the department in writing. A substantial revision to an application constitutes a new application.

(4) The department may accept applications at any time. The department shall evaluate applications for funding each time funds are available, up to one year from the date of application filing. An applicant may resubmit a proposal following the one-year evaluation period.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule VI sets out the procedures and timeframes for submitting and revising applications, and for evaluation of available funding. The proposed rule also gives the department the ability to request additional information as needed. This rule is necessary to clarify application procedures for the public, and to create a uniform procedure for all applications.

NEW RULE VII APPLICATION EVALUATION PROCEDURE (1) The department shall review each application to determine whether it includes information necessary to begin the evaluation process. If the department determines that an application is not substantially complete, the application shall be considered deficient and the department shall return the application to the applicant within 30 days after receipt by the department. The department shall list the application deficiencies in writing. An applicant may re-submit after correcting all identified deficiencies.

(2) For each loan application that meets the eligibility criteria in [NEW RULES III and IV], the department shall evaluate the application independently of other applications and determine whether the application meets the following technical criteria:

(a) equipment must be proven reliable and be commercially available;

(b) equipment and installation must meet all applicable certifications and standards, such as local building codes and utility interconnection requirements; and

(c) systems must use an alternative energy source.

(3) Applications that meet the criteria in (2) will be sent to the department's contracted financial institution for credit approval. The financial institution shall evaluate the credit-worthiness of applicants and shall advise the department whether to approve or deny credit. The financial evaluation must be consistent with the standard practices of financial institutions considering the type, size, risk, and complexity of the loan requested and the type of applicant.

(4) After approval by the financial institution, the department shall prioritize applications based on the following criteria:

(a) the amount of energy produced;

(b) the diversity of technology in the portfolio;
(c) investment/return ratio; and
(d) the use of a process, a system, or equipment generally available in Montana.

(5) The department shall award loans in the priority established in (4), subject to the availability of funds.

(6) If the department approves an application pursuant to these rules, the department shall indicate its decision to participate in a loan by executing a servicing agreement.

AUTH: 75-25-102, MCA

IMP: 75-25-102, MCA

REASON: New rule VII is necessary to identify the procedures and criteria by which applications will be evaluated, to clarify the standards that the department's financial contractor must use in evaluating the credit-worthiness of applicants, and to describe the process the department will follow to disperse loan funds.

The department will perform an initial review of projects to determine whether they meet the eligibility criteria in New Rule III and IV. The department then will review projects for compliance with the technical criteria in (2), which include a requirement that projects comply with state and local building codes and utility interconnection requirements for safety and accountability. Projects that meet the eligibility and technical criteria will be referred to a contracted financial institution for credit approval. If the financial institution approves credit, the department will prioritize the applications based on the criteria in (4), which are intended to create a portfolio of projects that will demonstrate the widest possible range of technologies and equipment appropriate to Montana's climate and resources. The department will award loans according to the priority established in (4), subject to the availability of funds.

NEW RULE VIII ENVIRONMENTAL REVIEW AND COMPLIANCE WITH APPLICABLE LAW

(1) The applicant shall assess the probable environmental consequences of the proposed project. Prior to executing a servicing agreement under [NEW RULE VII(6)], the department shall review each application under ARM Title 17, chapter 4, subchapter 6 to determine if the department's approval of a loan for the project may result in significant effects to the quality of the human environment.

(2) The applicant shall certify that the proposed project or activity will comply with applicable statutory and regulatory requirements protecting the quality of resources such as air, water, land, fish, wildlife and recreational opportunities.

AUTH: 75-25-102, MCA

IMP: 75-25-102, MCA

REASON: New rule VIII(1) reflects the requirement, found in the Montana Environmental Policy Act (MEPA), that the

Department evaluate the environmental consequences of the proposed loan. To assist in the Department's MEPA review, the rule requires the applicant to initially assess the environmental consequences of the project. New rule VIII(2) requires the applicant to certify that the proposed project will comply with applicable environmental laws. The proposed rule is necessary to provide for assessment of potential environmental impacts of loan projects and to ensure that loan projects do not violate Montana's environmental laws.

NEW RULE IX APPLICATIONS AND RESULTS PUBLIC

(1) Applications and reports submitted to the department pursuant to this subchapter may be made public, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New Rule IX reflects the requirement, found in Article 2, Section 9 of the Montana Constitution, that the public has the right to examine documents by public agencies except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. The department will treat all material in applications and reports as available for public review. If an applicant claims a privacy interest for certain material, the department will make a determination whether the privacy claim clearly exceeds the merits of public disclosure. This rule is necessary to inform the public that applications to this program and reports submitted are generally considered public information.

NEW RULE X LOAN CONDITIONS (1) The maximum term for loans is five years.

(2) Loans made under the Act and these rules must be used only for the purposes described in the loan application. Loan projects must be implemented within the time specified in the loan documents unless the department grants a written extension.

(3) The applicant shall financially qualify for the loan based on the credit scoring guidelines adopted by the department's contracted financial institution.

(4) The department shall charge a fixed interest rate that may be set to cover administrative costs, but shall not be less than one percent. The department shall review the interest rate annually.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule X is necessary to identify the primary conditions of loans. The rule identifies the maximum term of loans and the procedure by which the interest rates may be established. The interest rate charged will include a percentage for the department's financial contractor as

compensation for loan servicing.

NEW RULE XI REPORTS AND ACCOUNTING (1) During the construction/installation phase of the loan project, the department may require the loan recipient to provide oral or written progress reports.

(2) Upon completion of construction or installation, loan recipients shall provide the department with an accounting of loan expenditures.

(3) Loan recipients shall submit annual reports to the department during the term of their loan on a form provided by the department. Reports must estimate the amount of energy produced by the installed system during the year, provide information about system and component reliability, and provide all financial information required by the department's financial contractor.

(4) Loan recipients shall maintain records, documents, and other information relating to the loan project and shall maintain records sufficient to account for all funds received and expended pursuant to their loan. All records, reports, and other documents that relate to the project are subject to audit by the office of the legislative auditor, the department, and where required by law, the legislative fiscal analyst.

AUTH: 75-25-102, MCA
IMP: 75-25-102, MCA

REASON: New rule XI allows the Department to require loan recipients to provide progress reports during the construction/installation phase of a project. Upon completion of construction/installation, loan recipients must provide an accounting of loan expenditures. The rule also requires that annual reports be submitted and requires the loan recipient to maintain accounting and other records relating to the loan project. These provisions are necessary to allow the Department to monitor construction/installation progress, to ensure that loan proceeds are spent for the approved purposes, to collect information to meet statutory reporting requirements to evaluate program impacts, and to evaluate the program's potential impact on component and installation prices.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Kathi Montgomery, Technical and Financial Assistance Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; by fax (406) 444-6836; or by email to kmontgomery@state.mt.us, no later than January 23, 2003. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. James M. Madden, attorney, has been designated to preside over and conduct the hearing.

6. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@state.mt.us or may be made by completing a request form at any rules hearing held by the Department.

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

James M. Madden

JAMES M. MADDEN

Rule Reviewer

BY: Jan P. Sensibaugh

JAN P. SENSIBAUGH, Director

Certified to the Secretary of State, December 16, 2002.

BEFORE THE BOARD OF PSYCHOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of ARM 8.52.604 and 8.52.616, and the proposed adoption of new rule I, relating to psychology matters) NOTICE OF PROPOSED) AMENDMENT AND ADOPTION)) NO PUBLIC HEARING) CONTEMPLATED

TO: All Concerned Persons

1. On January 25, 2003, the Board of Psychologists (Board) proposes to amend and adopt the above stated rules relating to psychology matters.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., on January 10, 2003 to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibspsy@state.mt.us.

3. The rules proposed to be amended provide as follows: (stricken matter interlined, new matter underlined)

8.52.604 APPLICATION PROCEDURES (1) remains the same.

(2) A completed application file ~~shall consist~~ consists of the completed and notarized application form, transcripts of all graduate work completed, program and course descriptions from the official college catalog(s), three work samples, and completed reference forms from a minimum of five references ~~of attesting to the applicant's~~ good moral character. An application file must be complete at least 90 days in advance of the ~~April or October~~ examination dates.

(a) Work samples ~~shall~~ must be written examples of recent work (within two years of application date), at least two of which must be psychological evaluations. The purpose of the evaluations must ~~is to~~ demonstrate competence in history taking, administration and interpretation of formal tests of intelligence, and administration and interpretation of objective and projective tests of personality. Tests utilized must be those widely recognized and respected in the practice of psychology. Projective testing will include projective techniques, at least one of which is a rorschach or an apperception test. Each of the two evaluations must include the integration and interpretation of history taking, intelligence testing, and personality testing leading to an

appropriate diagnosis and recommendations. Examples Evaluations must also demonstrate competence in formulating appropriate diagnoses using the five axes specified in the diagnostic and statistical manual of mental disorders (DSM) as well as making appropriate recommendations. Work samples do not include newspaper or other similar articles or publications. All identifying information must be removed from work samples submitted to the board. Questions regarding the work samples may be included in the oral examination and candidates may be requested to present the raw data upon which their work samples were based.

(b) Reference ~~letters~~ forms must be from people familiar with the quality of the applicant's education and work experience. At least three of the references ~~should~~ must be licensed psychologists and ~~at least three should~~ may be members of the American psychological association.

(3) through (5) remain the same.

AUTH: 37-1-131, 37-17-202, MCA
IMP: 37-17-302, MCA

REASON: The Board of Psychologists finds there is reasonable necessity to propose a rule change to clarify the requirements for the good moral character forms and the work samples that are components of the licensure application for psychologists. Several recent applicants have submitted incomplete work samples and moral character forms that required additional correspondence from the Board and caused delay in the licensure process. The Board anticipates that these proposed clarifications would eliminate confusion concerning these requirements. This rule change will affect all psychology licensure applicants.

8.52.616 FEE SCHEDULE (1) through (1)(d) remain the same.

(e) Late renewal fee 100

AUTH: 37-1-134, 37-17-202, MCA
IMP: 37-17-302, 37-17-303, 37-17-306, 37-17-307, MCA

REASON: The Board finds it is reasonable and necessary to amend the rules to implement a late renewal fee of \$100.00. The previously existing late fee was eliminated from statute in the 2001 legislative session in Chapter 492, Laws of 2001 (House Bill 120) so that it could be placed in the fee schedule located in the Board's rules. The additional costs of tracking, certified mailings, and both administrative and Board time involved in the late renewal process should be born only by those who renew after the deadline date. The Board anticipates that this change will affect approximately five licensed psychologists annually who renew after the required date. The Board estimates that the annual economic impact of the fee proposal is \$500.

4. The proposed new rule provides as follows:

NEW RULE I DEFINITION OF ONE YEAR'S RESIDENCY

(1) "One year's academic residency" means 18 semester hours or 27 quarter hours earned on a full-time or part-time basis at the educational institution granting the doctoral degree.

(a) The residency must be accumulated in not less than nine months and not more than 18 months and must include student-to-faculty contact involving face-to-face (personal) group courses. Such educational meetings must:

(i) include both faculty-to-student and student-to-student interaction;

(ii) be conducted by the psychology faculty of the institution at least 90% of the time;

(iii) be fully documented by the institution; and

(iv) relate substantially to the program and course content.

(b) An internship requirement cannot be used to fulfill the academic year requirements of the residency.

(c) The institution must clearly document its assessment and evaluation of the applicant's performance.

AUTH: 37-17-202, MCA

IMP: 37-17-302, MCA

REASON: The Board proposes there is reasonable necessity to adopt this rule. This new rule is necessary to respond to requests from potential license applicants as to what a psychology educational program should include to meet the board's minimum standards for a "one year's residency." The Board intends to promulgate a new definition rule to include this clarification. This rule will affect potential license applicants who seek to determine whether a psychology educational program meets the board's requirements for licensure.

5. Concerned persons may present their data, views or arguments concerning this proposed amendment and adoption in writing to the Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibspsy@state.mt.us to be received no later than 5:00 p.m., January 24, 2003.

6. If persons who are directly affected by the proposed amendment and adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Cheryl Brandt, Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibspsy@state.mt.us. A written request for hearing must be received no later than January 24, 2003.

7. If the Board receives requests for a public hearing on the proposed amendment and adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment and adoption; from the appropriate administrative rule review committee of the legislature, from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 23 persons based on approximately 230 licensees.

8. The Board of Psychologists maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this Board. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Psychologists administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibspsy@state.mt.us or may be made by completing a request form at any rules hearing held by the Department of Labor and Industry.

9. The Board will meet in February, 2003, in Helena to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments and adoption. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments and new rule beyond the January 24, 2003, deadline.

10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

BOARD OF PSYCHOLOGISTS
MARIAN MARTIN, PhD, CHAIR

By: /s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE BOARD OF HEARING AID DISPENSERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the) NOTICE OF PUBLIC
proposed amendment of) HEARING ON PROPOSED
ARM 24.150.401, Fees) AMENDMENT

TO: All Concerned Persons

1. On January 21, 2003 at 9:00 a.m., a public hearing will be held in the Professional and Occupational Licensing conference room #471, Park Avenue Building, 301 South Park, Helena, Montana to consider the proposed amendment.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Montana State Board of Hearing Aid Dispensers no later than January 10, 2003, to advise us of the nature of the accommodation that you need. Please contact Ms. Linda Grief, Board of Hearing Aid Dispensers, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2395; e-mail dlibsddhad@state.mt.us.

3. The rule proposed to be amended provides as follows: (new matter underlined, deleted matter interlined)

<u>24.150.401 FEES</u>	(1) The fees shall be as follows:	
(a) Application fee (includes initial written and practical examination)		\$225
(b) Application fee for licensees from other states		75
(c) Re-examination -- written		170
(d) Re-examination -- practical (includes renewal of trainee license)		130
(e) Original license		<u>150</u> 125
(f) Renewal active license		<u>275</u> 200
(g) Renewal inactive license		<u>100</u> 60
(h) Copies of law and rules		5
(i) Penalty for late renewal paid in addition to renewal fee (active or inactive)		<u>175</u> 100
<u>(j) Lists of licensees</u>		<u>20</u>
(2) All fees payable to the board are nonrefundable.		

AUTH: 37-1-134, 37-16-202, MCA
IMP: 37-1-134, 37-16-202, 37-16-402, 37-16-404, 37-16-405, 37-16-407, MCA

REASON: The Board has determined that it is reasonably necessary to make the proposed changes in fees to comply with the provisions of 37-1-134, MCA, and to keep the fees

commensurate with costs. The Board estimates that approximately 96 persons (86 active licensees, 4 inactive status licensees, and 6 new applicants) will be affected by the proposed fee changes. The estimated annual increase in revenue is approximately \$6,352. Under the proposed fee schedule, the Board's projected annual revenue is \$24,280. The Board's appropriation for fiscal year 2003 is \$21,887. A legislative audit of the Business Standards Division required that all boards pay a proportionate share of data conversion to the Oracle database system. The Oracle reallocation for the Board is \$509, and is in addition to the appropriation for the Board. The reallocation is required to be paid in fiscal year 2003. The Board's recharge will be increased by \$7,115 in fiscal year 2004, and by \$7,722 in 2005. The recharge allocation is based on the Board's allocated FTE. The percentage of total board allocated FTE is based on the daily time distribution sheet; personal services charges for the HCLB; personnel allocation without investigator (4 FTE); HCLB bureau budget; Business Standards Division recharge; and BSD Legal allocation. The Business Standards Division has implemented the alternative pay plan with those increases reflected in the board's recharges. The Board last raised its fees in fiscal year 2001.

4. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Montana Board of Hearing Aid Dispensers, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsddhad@state.mt.us and must be received no later than 5:00 p.m., January 24, 2003.

5. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at <http://discoveringmontana.com/dli/bsd> under the Board of Hearing Aid Dispensers rule notice section. The Department strives to make the electronic copy of this notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum does not excuse late submission of comments.

6. The Board of Hearing Aid Dispensers maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name included on the list shall make a written

request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Hearing Aid Dispenser administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Hearing Aid Dispensers, 301 South Park, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to dlibsddhad@state.mt.us or may be made by completing a request form at any rule hearing held by the agency.

7. The Board of Hearing Aid Dispensers will meet at 1:00 p.m., January 30, 2003 during the Board's regular meeting in Helena, Montana at the Board's offices, 301 South Park, Helena, Montana, to consider the comments made by the public, the proposed responses to those comments, and take final action on the proposed amendments. Members of the public are welcome to attend the meeting and listen to the Board's deliberations, but the Board cannot accept any comments concerning the proposed amendments beyond the January 24, 2003, deadline.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

9. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

BOARD OF HEARING AID DISPENSERS
DAVID KING, CHAIRMAN

/s/ WENDY J. KEATING
WENDY J. KEATING, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

/s/ KEVIN BRAUN
Kevin Braun,
Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF PUBLIC HEARING
of Rule I and the amendment	)	ON PROPOSED ADOPTION AND
of ARM 37.36.101, 37.36.401,	)	AMENDMENT
37.36.402, 37.36.406,)	
37.36.602, 37.36.603,)	
37.36.607, 37.36.611,)	
37.36.612 and 37.36.901)	
pertaining to the Montana)	
telecommunications access)	
program (MTAP))	

TO: All Interested Persons

1. On January 17, 2003, at 10:00 a.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption and amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rule as proposed to be adopted provides as follows:

RULE I FINANCIAL CRITERIA FOR ELIGIBILITY FOR LOANS OF EQUIPMENT; SLIDING FEE SCALE (1) A person whose gross family income does not exceed 400% of the 2002 poverty guidelines published by the U.S. department of health and human services (HHS) is eligible for a loan or purchase of specialized communications equipment based on income. The HHS 2002 poverty guidelines for families of various sizes are shown in (4), along with the levels of income which constitute 250%, 300%, 350% and 400% of the poverty guidelines.

(2) Some persons who are eligible for a loan or purchase of specialized telecommunications equipment will be required to pay a fee for the loaned equipment, based on their income.

(a) A person whose gross family income is less than 250% of the 2002 HHS poverty guideline is not required to pay any fee for the equipment.

(b) A person whose gross family income is 250% through 400% of the 2002 HHS poverty guideline is required to pay a one-

time, non-refundable fee for equipment which is equal to a percentage of the cost of the equipment to MTAP as shown in MTAP's table of equipment costs as amended through January 18, 2002. MTAP's table of equipment costs as amended through January 18, 2002 is hereby adopted and incorporated by reference. A copy of the table of equipment costs is available on request from the Montana Telecommunications Access Program, 111 North Last Chance Gulch, Suite C, Helena, MT 59604. Fees are set forth in (3).

(3) The sliding fee scale for equipment is as follows:

FAMILY INCOME AS PERCENTAGE OF POVERTY GUIDELINE	FEE AS PERCENTAGE OF COST
250-299%	25%
300-349%	50%
350-399%	75%

(4) The 2002 poverty guidelines and the income levels based on those guidelines are as follows:

FAMILY SIZE	100% OF POVERTY GUIDELINE	250% OF POVERTY GUIDELINE	300% OF POVERTY GUIDELINE	350% OF POVERTY GUIDELINE	400% OF POVERTY GUIDELINE
One	\$ 8,860	\$22,150	\$26,580	\$ 31,010	\$ 35,440
Two	11,940	29,850	35,820	41,790	47,760
Three	15,020	37,550	45,060	52,570	60,080
Four	18,100	45,250	54,300	63,350	72,400
Five	21,180	52,950	63,540	74,130	84,720
Six	24,260	60,650	72,780	84,910	97,040
Seven	27,340	68,350	82,020	95,690	109,360
Eight	30,420	76,050	91,260	106,470	121,680
Each Additional Person, Add	3,080	7,700	9,240	10,780	12,320

(5) There is no asset test to be eligible for a loan or purchase of equipment.

AUTH: Sec. 53-19-305, MCA
IMP: Sec. 53-19-307, MCA

3. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.36.101 DEFINITIONS For purposes of this chapter, the following definitions apply:

(1) through (4)(c) remain the same.

(5) "Department" means the department of public health and human services.

(5) remains the same but is renumbered (6).

(7) "Family" means the person with a telephone usage disability and the following relatives of the person with a telephone usage disability who live in the same household:

(a) the spouse;

(b) the mother and/or father, if the person with a telephone usage disability is a minor child. This includes biological parents and parents by adoption and, at the option of the person with a telephone usage disability, may include stepparents;

(c) the minor children of the person with a telephone usage disability. This includes biological children, and children by adoption and, at the option of the person with a telephone usage disability, may include stepchildren; and

(d) all minor siblings. This includes half-siblings and, at the option of the person with a telephone usage disability, may include step-siblings.

~~(6)~~ (8) "Gross income" means the total income, including earned and unearned income, before taxes or any other deductions, of the family of the individual applying for or receiving a telecommunication device from MTAP. Gross income does not include the income of other members of the individual's household and does not include in kind income.

(7) remains the same but is renumbered (9).

(10) "Mobility-impaired" means having reduced function of the arms and hands, making activities related to moving, turning, or pressing objects difficult or impossible. The term includes difficulty in using a wide range of telecommunications equipment.

(8) and (9) remain the same but are renumbered (11) and (12).

~~(10)~~ (13) "Person with a telephone usage disability" means an individual who is deaf, deaf-blind, hard-of-hearing, or speech impaired, or mobility-impaired and is in need of specialized telecommunications equipment.

(11) and (12) remain the same but are renumbered (14) and (15).

~~(13)~~ (16) "Specialized telecommunications equipment" means any telecommunications device which enables or assists a person with a telephone usage disability to communicate with others by means of the conventional telephone network. The term includes but is not limited to telecommunications devices, puff-blow devices, electronic artificial larynx devices, amplified handsets, and telebraille and equipment for the mobility-impaired.

(14) and (15) remain the same but are renumbered (17) and (18).

AUTH: Sec. 53-19-305 and 53-19-307, MCA

IMP: Sec. 53-19-305 and 53-19-307, MCA

37.36.401 LOANS PROVISION OF EQUIPMENT (1) Specialized

telecommunications equipment will be provided to A a person who satisfies the eligibility requirements of ARM 37.36.403 is eligible for a cost free loan of specialized telecommunications equipment. 37.36.603 and [Rule I] only after the individual has:

(a) received training and signed a written agreement accepting the conditions of the loan or purchase as prescribed in ARM 37.36.612; and

(b) paid the fee required under [Rule I], if any.

(2) remains the same.

AUTH: Sec. 53-19-305 and 53-19-307, MCA

IMP: Sec. 53-19-307, MCA

37.36.402 OWNERSHIP (1) A person who is determined eligible to receive specialized telecommunications equipment and who has paid a fee equal to at least one-half of the cost of the equipment has the option of purchasing the equipment or receiving it as a loan. An eligible person who has not paid a fee equal to at least one-half of the cost of the equipment does not have the option of purchasing the equipment but receives the equipment as a loan.

(1) remains the same but is renumbered (2).

(3) If a person chooses to purchase the equipment, the equipment becomes the person's property when the fee provided in [Rule I] has been paid. The tracking requirements of (2) do not apply to equipment which has been purchased. MTAP is not obligated to service or replace equipment which has been purchased, but may do so at MTAP's discretion.

AUTH: Sec. 53-19-305 and 53-19-307, MCA

IMP: Sec. 53-19-307, MCA

37.36.406 SECURITY DEPOSIT (1) Each recipient Persons who receive a loan of equipment with a value of more than \$1,000 must post a security deposit of \$5.00. Purchasers of equipment are not required to post a security deposit.

(2) and (3) remain the same.

AUTH: Sec. 53-19-307, MCA

IMP: Sec. 53-19-307, MCA

37.36.602 APPLICATION PROCESS (1) A person wishing to receive a loan or purchase of specialized telecommunications equipment shall complete the application and return it to the address designated in the application form. Application may be made by the person wishing to receive equipment, by a parent or legal guardian of a person under the age of 18 years or by a person duly authorized by the person or by a court to act on the person's behalf.

(2) remains the same.

AUTH: Sec. 53-19-307, MCA

IMP: Sec. 53-19-305, MCA

37.36.603 NONFINANCIAL ELIGIBILITY CRITERIA (1) To be eligible for a loan or purchase of specialized telecommunications equipment, an applicant, in addition to meeting the financial criteria for eligibility in [Rule I], must:

(a) through (c) remain the same.

(d) be able to demonstrate the applicant's ability to understand the nature and use of the equipment; and

(e) have regular access to telephone service; and.

~~(f) have gross annual income of \$35,000 or less.~~

(2) A person who is otherwise eligible shall not be eligible for a loan or purchase of equipment if:

(a) and (b) remain the same.

AUTH: Sec. 53-19-305 and 53-19-307, MCA

IMP: Sec. 53-19-307, MCA

37.36.607 NOTICES (1) The applicant will be notified in writing whether the application is denied or approved and of the fee which the applicant must pay for the equipment, if any. Notice must be given within 30 days of the date of receipt of the application if no verification is requested. If verification of income and/or telephone usage disability is requested, notice must be given within 30 days of the date of receipt of the necessary verification.

(2) remains the same.

(3) A notice approving the application must notify the applicant of the appeal procedure provided in ARM 37.36.902 if the applicant disputes the amount of the fee required for the loan or purchase of the equipment.

(3) remains the same but is renumbered (4).

~~(4)~~ (5) If a loan or purchase of equipment is terminated due to failure to comply with any of the conditions specified in ARM 37.36.612 or for any other reason, the recipient must be notified in writing of the reason for the termination and of the appeal procedure provided in ARM 37.36.902.

AUTH: Sec. 53-19-305 and 53-19-307, MCA

IMP: Sec. 53-19-305, MCA

37.36.611 PRIORITIES (1) If program resources are not sufficient to provide equipment to all eligible applicants, equipment will be loaned provided on a first come, first served basis.

AUTH: Sec. 53-19-307, MCA

IMP: Sec. 53-19-305, MCA

37.36.612 REQUIRED TRAINING AND CONDITIONS OF ACCEPTANCE

(1) A person whose application for a loan or purchase has been approved must complete training as required by the program and must demonstrate the ability to use the equipment before specialized telecommunications equipment will be issued.

(2) The following conditions apply only to persons who

receive a loan of equipment and not to persons who have chosen to purchase equipment:

(2) (a) A person who has completed the required training and has been issued equipment may be required to complete further training before being issued new or replacement equipment.

(3) (b) Before equipment is issued, the person to receive equipment, or the person's parent or legal guardian if the person is under the age of 18 years and is not emancipated, must agree in writing to the following conditions:

(a) (i) The equipment is for use with a telephone and for no other purpose. If a recipient no longer has regular access to telephone service, the loan will be terminated and the equipment must be returned to the program.

(b) (ii) The recipient must protect the equipment from damage. Any equipment which is damaged by deliberate abuse or misuse will not be replaced.

(c) (iii) Any equipment needing repair must be taken to a repair service authorized by the program or to the program office immediately. The recipient shall not take the equipment apart or attempt to repair it.

(d) (iv) Stolen equipment must be reported to the proper law enforcement authority within 24 hours of the discovery of the theft and a copy of the written theft report must be sent to the program within 5 five days of the date of making the report.

(e) (v) Lost equipment, other than that reported stolen, must be reported to the program within 5 five days of loss. Lost equipment will not be replaced.

(f) (vi) Because the equipment is owned by the state of Montana, it may not be taken out-of-state for more than 90 consecutive days without written authorization in advance from the program.

(g) (vii) If the recipient's address changes within the state of Montana, recipient must notify the program of the new address within 20 days after the date of the move. If the recipient moves out of the state of Montana, the equipment must be returned prior to the move.

(h) (viii) The recipient must not sell, give away or loan the equipment to any other person or entity.

(i) (ix) The recipient will be liable to the state of Montana for any claims for damages or expenses arising from the misuse of loaned equipment by any person or entity.

AUTH: Sec. 53-19-307, MCA

IMP: Sec. 53-19-305, MCA

37.36.901 GROUND FOR APPEAL (1) In accordance with the procedures set forth in ARM 37.36.902, an applicant or recipient may appeal any decision of the program regarding:

(a) eligibility for a loan or purchase of equipment;

(b) the amount of the fee the recipient is required to pay for the loan or purchase of equipment;

(c) what is the appropriate communication device for the applicant or recipient;

~~(e)~~ (d) priority for distribution of communication devices; or
~~(d)~~ (e) termination of a loan.

AUTH: Sec. 53-19-307, MCA
IMP: Sec. 53-19-305, MCA

4. The Montana Telecommunications Access Program (MTAP) provides specialized telecommunications equipment to persons who need such equipment to communicate effectively on the telephone. MTAP is administered by the Committee on Telecommunications Access Services for Persons with Disabilities (the Committee). The amendment of the administrative rules governing MTAP is now necessary to implement amendments to MTAP's governing statutes at 53-19-301 through 53-19-312, MCA, made by the 57th Montana Legislature in 2001 Laws of Montana, Chapter 297.

Prior to these amendments, the MTAP statute defined person with a disability to mean an individual who is deaf, deaf and blind, hard-of-hearing, or speech impaired. 2001 Laws of Montana, Chapter 297 expanded the definition of person with a disability to include persons who are mobility impaired. It is therefore necessary to amend ARM 37.36.101, the definitions rule, to enlarge the definition of the term "person with a telephone usage disability" to include mobility-impaired persons and to add the definition of "mobility-impaired person" provided in 2001 Laws of Montana, Chapter 297. The definition of specialized telecommunications equipment also must be amended to include equipment for the mobility-impaired. A definition of "family" is also being inserted in ARM 37.36.101 because 2001 Laws of Montana, Chapter 297 provides that eligibility for MTAP should be limited to persons whose family income does not exceed 400% of the federal poverty level (FPL). The federal poverty levels used are those published by the U. S. Department of Health and Human Services, as specified in Rule I.

Before its amendment by 2001 Laws of Montana, Chapter 297, the MTAP statute authorized the Committee to develop an appropriate means test for eligibility for services and equipment, but it did not contain any specific income criteria for eligibility. 2001 Laws of Montana, Chapter 297 amended the statute to specify that eligibility will be limited to persons whose family income does not exceed 400% of the FPL. ARM 37.36.603(1)(e) currently restricts loans of equipment to persons whose gross annual income is \$35,000 or less, regardless of the size of the person's family. Thus, (1)(e) of ARM 37.36.603 must be deleted, since the \$35,000 gross income limit is no longer applicable, and Rule I is now being adopted to specify the new financial eligibility criteria specified in 2001 Laws of Montana, Chapter 297.

Section (4) of Rule I shows in table form the levels of income equal to 400% of the FPL for families of various sizes. The table also shows the amounts which equal 100% and 250% of the

FPL for various family sizes. The 250% of poverty standards are included because 2001 Laws of Montana, Chapter 297 requires the Committee to charge fees to all eligible persons whose income exceeds 250% of the FPL.

Prior to its amendment the statute did not authorize the Committee to charge any fees for services. 2001 Laws of Montana, Chapter 297 provides that the Committee must charge individuals whose family income is between 250% and 400% of poverty a fee for equipment. 2001 Laws of Montana, Chapter 297 further provides that in setting fees the Committee must take into account the amount of funds available to MTAP and that the fee must increase progressively as family income becomes a higher percentage of the poverty level. The Legislature gave the Committee discretion to provide equipment at no charge to persons whose family income is less than 250%, if sufficient funds are available to do so.

MTAP is funded by an assessment of 10 cents per month per telephone access line, as provided in 53-19-311, MCA. The Committee determined that MTAP has enough funds available from the assessment that it is not necessary to charge any fee to persons whose family income is below 250% of poverty. The Committee further decided, again based on available funds, that persons with income from 250 to 299% of poverty should pay 25% of the cost of the equipment, persons with income from 300% to 349% of poverty should pay 50% of the cost, and persons with income from 350 to 400% of poverty should pay 75% of the cost. These fees are set forth in (3) of Rule I. The list of costs for different types of specialized telecommunications equipment published by MTAP is adopted and incorporated by reference rather than being included in Rule I, because it is somewhat lengthy.

ARM 37.36.401(1) currently states that a person who meets the eligibility criteria is entitled to a cost free loan of equipment. This provision is being deleted because equipment is no longer provided at no cost to persons with income over 250% of poverty. ARM 37.36.401 is further being amended to state that an eligible person will be provided with equipment after the person has received training on use of the equipment, has signed an agreement specifying the conditions of the loan, and has paid the required fee, if any. The requirement to pay the applicable fee in advance is mandated by 2001 Laws of Montana, Chapter 297. The requirements to attend training and sign an agreement are already stated in ARM 37.36.612 and are not new, but they are being added to this rule so that all requirements which must be fulfilled before equipment is provided are stated in one place.

ARM 37.36.402 currently provides that all equipment loaned by MTAP remains the property of the State of Montana. When this rule was adopted equipment was provided to all eligible individuals at no cost. Since the recipient of the equipment

had no financial investment in the property, the property was merely loaned to the recipient but remained the property of the State. Under the new rule which requires some individuals to pay as much as 75% of the cost of the equipment, it was determined that it was not fair for the State to retain ownership of property when the recipient had paid a substantial portion of the cost of the equipment. It was therefore decided that persons who had paid a fee equal to at least one-half of the equipment's cost should be allowed to purchase the equipment. On the other hand, if the recipient purchases the equipment, MTAP should not be obligated to replace or service defective or malfunctioning equipment. Since there are both advantages and disadvantages to being the owner of the equipment, it was decided that the recipient should have the option of purchasing equipment or receiving it as a loan if the recipient has paid a fee equal to at least 50% of its cost.

Thus, it is necessary to amend ARM 37.36.402 to provide that a recipient who has paid at least one-half of the equipment's cost has the option of purchasing it and to specify that MTAP is not obligated to track the equipment or to service or replace it if the equipment has been purchased. Additionally, references throughout the rules to "loaned equipment" or "the loan of equipment" are being replaced with references to "provided equipment" or "the loan or purchase of equipment", which is necessary to reflect the fact that some recipients will now have the option of purchasing equipment. ARM 37.36.406, which currently provides for payment of a refundable security deposit on all loaned equipment, is also being changed to state that no deposit is required when a recipient opts to purchase the equipment. This change is necessary because the purpose of the security deposit is to encourage recipients who are using equipment which belongs to the State to take proper care of it. Thus a security deposit is unnecessary if the recipient owns the equipment.

ARM 37.36.607 regarding an applicant's right to notice is being amended to specify that the notice denying or approving an application must state what fee is payable, if any, and must notify the applicant of the right to a hearing to dispute the amount of the fee being required. Similarly, ARM 37.36.901 regarding appeal rights is being amended to provide that an applicant may appeal if the applicant disputes the amount of the fee the applicant is being required to pay.

The amendment of the rules to change the income requirements for eligibility and to require higher income recipients to pay a nonrefundable fee will affect approximately 4,482 individuals needing specialized telecommunications equipment per year. It is estimated that individuals who are required to pay for equipment will pay fees totaling approximately \$7,212 in the next biennium. However, there will be additional costs to MTAP of approximately \$153,867 for the biennium to implement the new fee system. Thus, there will be a net loss to the program of

approximately \$146,655 in the next biennium as a result of the proposed changes.

The additional costs to MTAP are due to a number of factors. It will be necessary to employ an eligibility examiner on a full-time basis to determine whether a person seeking equipment meets the income guidelines and what fees, if any, the applicant will be required to pay. There will also be a significant increase in the program's travel expenses as a result of the requirement that an applicant pay the required fee prior to receiving the equipment. Rather than providing equipment to a number of clients in one area at the same time, the program's equipment distribution specialists will have to make more trips to the same area because they cannot provide the equipment until each applicant has paid the required fee. There will also be costs for new accounting software, the creation of a new database system to accommodate the new eligibility requirements, and the revision of applications, brochures, and the MTAP website. The latter costs are primarily one-time expenses, while the costs of additional travel by equipment distribution specialists and of employing an eligibility examiner will be continuing expenses.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on January 23, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

6. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Ron Bibler
Chairman of the Montana
Telecommunications Access Committee

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption) NOTICE OF PUBLIC HEARING
of new rules I through XXI) ON PROPOSED ADOPTION
pertaining to the child and)
adult care food program)

TO: All Interested Persons

1. On January 15, 2003, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed adoption of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be adopted provide as follows:

RULE I DEFINITIONS For purposes of this chapter, the following definitions apply:

(1) "Active recruitment" means direct contact initiated by a sponsoring organization with a day care home currently participating with another sponsor for the purpose of soliciting a provider to enroll with any particular sponsoring organization.

(2) "Administrative funds" means USDA child and adult care food program (CACFP) grant funds distributed to qualifying non-profit sponsoring organizations contracting with the department to administer the CACFP.

(3) "Advanced payment" means funds made available to an entity for its CACFP costs prior to the month in which such costs will be incurred.

(4) "Adverse administrative action" means an action taken by the state CACFP in the administration of the CACFP having a negative impact, including the following:

- (a) denial of the entity's application for participation;
- (b) denial of an application submitted by a sponsoring organization of centers on behalf of a facility;
- (c) termination or suspension of an entity from participation in CACFP;
- (d) denial of an entity's application for start-up funds;

(e) denial of an entity's application for advance payment;
(f) denial of all or part of an entity's claim for reimbursement, provided the claim was submitted in a timely manner;

(g) denial by the state agency to forward to food and nutrition services (FNS) an exception request by the entity for payment of a late claim or a request for an upward adjustment to a claim; or

(h) demand for the remittance of an overpayment against an entity.

(5) "Announced visit" means a site visit that occurs after forewarning.

(6) "Authorized capacity" means the number of children that a licensed child care center or day care home is able to have in care at any one time including overlap.

(7) "CACFP" means the child and adult care food program as designated in section 17 of the National School Lunch Act as amended (codified at 42 USC 1766).

(8) "Combination food" means an entree with more than one CACFP required food component included in its ingredients.

(9) "Corrective action plan" means a plan, approved by the department, indicating the actions to be taken by an entity for the purpose of correcting a deficiency or addressing a problem.

(10) "Day care home" means a family or group day care home as those terms are defined in 52-2-703, MCA.

(11) "Department" means the department of public health and human services.

(12) "Disciplinary action" means an action taken for the purpose of modifying behavior or correcting a situation or circumstance.

(13) "Elementary school" means any school serving children in grades K through 8.

(14) "Entity" means a sponsoring organization, child care center, outside-school-hours care center, special after school snacks center, head start center, proprietary Title XX center, or proprietary free, reduced, paid center that enters into an agreement with the department to administer the CACFP in a specific area for a specific period of time.

(15) "Licensing staff" means department personnel who enforce state laws and rules for the purpose of licensing and regulation of child care providers.

(16) "Processed meats", for purposes of the CACFP, means hot dogs, corn dogs, sausage, and food of this type, but does not include ground meats such as hamburger or cured meat such as ham.

(17) "Program" means the child and adult care food program.

(18) "Proprietary center" means a qualifying child care center participating in the CACFP as a for-profit center and is a Title XX facility provided:

(a) at least 25% of enrolled or authorized capacity is paid from a state-pooled funding source which includes federal Title XX funds; and

(b) at least 25% of its enrollment or authorized capacity

is in the free and reduced category.

(19) "Provider recruitment" means the act of seeking to enroll prospective program participants into the CACFP.

(20) "School attendance area" means the specific geographical area whose student population is served by a specific elementary school.

(21) "Seriously deficient" has the same meaning as "seriously deficient" in 7 CFR 226.2, the definitions pertaining to CACFP, which is hereby adopted and incorporated into this rule. A copy of 7 CFR 226.2 (2002) is available from the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952.

(22) "Sponsoring organization or sponsor" means an organization under contract with the department that is responsible for the administration of the CACFP at various facilities.

(23) "Tiering" means categorizing day care homes based on established criteria for income standards, school designation, and census block numbering area.

(24) "USDA" means the United States department of agriculture.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE II ADVANCES (1) The department may, in its discretion, decide whether to advance a payment. The amount of any advance payment will be based on the historical payment data for the specific entity. Any and all advance payments will be repaid to the department prior to the beginning of the next fiscal year.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE III AUDIT GRANTS (1) An entity may be eligible to receive a grant from the department for the purpose of reimbursing an entity for all or part of the CACFP portion of an audit. To qualify for a grant, an entity must meet the following minimum requirements:

(a) An audit must be a condition for participation or continued participation in the CACFP.

(b) The professional services of the auditor or auditors must be performed in accordance with all applicable state and federal laws, regulations, and policies relating to purchasing and professional services acquisition.

(c) Prior to beginning an audit, the entity must submit to the department for approval:

(i) a completed request for reimbursement of audit expenses;

(ii) a signed copy of the audit proposal, including the proposed audit cost, the resume of the on site auditor or auditors, and certification that the audit will include tests of

the CACFP in accordance with current federal office of management and budget (OMB) curricular A-133;

(iii) a completed copy of a federal debarment and suspension certificate, signed by the auditor engaged to perform the audit; and

(iv) evidence the supervising auditor is a certified public accountant.

(d) Prior to beginning the audit, the entity must:

(i) provide a copy of the current state CACFP audit policy to the auditor engaged to perform the audit; and

(ii) obtain written approval for the audit from the department.

(e) The audit must be completed no later than nine months after the end of the fiscal year being audited.

(2) If an audit grant is awarded, the entity must submit to the department within 30 days following completion of the audit:

(a) two copies of the audit (including management letters referenced in the audit report);

(b) a copy of the final invoice from the auditor, documenting the cost of an OMB circular A-133 audit; and

(c) a time log documenting actual direct costs of auditing the program.

(3) The department may authorize a grant for up to the actual direct cost of auditing the program.

(4) All potential auditors of CACFP entities' CACFP programs may be required to attend and successfully complete CACFP-specific training in order to perform audits that are eligible for grants under this rule and to learn any CACFP-program specific requirements. Publication and announcements relating to such training will occur not less than 120 days prior to the date training will be offered.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE IV CIVIL RIGHTS (1) The CACFP is a federal program and all participants must comply with Title VI of the Civil Rights Act of 1964. The full description of participant responsibilities is set forth in the civil rights section of the CACFP Manual, and is hereby adopted and incorporated by this reference. A copy of the CACFP manual section is available from the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952.

(2) The CACFP is a federally funded program which requires the inclusion of the USDA nondiscrimination statement and an appropriate statement of equal opportunity to be used in all informational materials disseminated to the public. The following full nondiscrimination statement must be included in correspondence pertaining to the CACFP wherever possible:

(a) "In accordance with federal law and U.S. Department of Agriculture policy, this institution is prohibited from discriminating on the basis of race, color, national origin,

sex, age, or disability."

(b) "To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue SW, Washington, DC 20250-9410, or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer."

(3) If the material is too small to permit the full statement to be included (i.e., brochures, coupons, electronic benefit cards, flyers, and other media of less than a page) the material will, at a minimum, include USDA's short nondiscrimination statement, as follows: "THIS INSTITUTION IS AN EQUAL OPPORTUNITY PROVIDER AND EMPLOYER."

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE V APPEALS AND FAIR HEARINGS (1) Except as provided in (2), an entity may appeal an adverse administrative action through the department's office of fair hearings pursuant to the procedures provided in ARM Title 37, chapter 5. An entity must file a written request for an appeal within 15 calendar days of receiving notification of an adverse administrative action by providing the written request either to the CACFP or state staff located at the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952 or to the center's sponsoring organization.

(2) A day care home, participating through a sponsoring organization, may appeal through the department's office of fair hearings when there is a determination to terminate the home's participation in the CACFP. All other adverse administrative actions taken against a day care home must be reviewed through the sponsoring organization's internal review process.

(3) Decisions made by FNS of the USDA pertaining to requests for exceptions to the claims submission deadlines are not subject to appeal through the state's administrative appeal process.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE VI CORRECTIVE ACTION PLAN (1) An entity receiving notice that it is seriously deficient, or deficient in some aspect of the CACFP shall submit to the department a corrective action plan to correct the deficiency, postmarked within 30 days of receipt of the deficiency notice provided by the department. Any entity that fails to submit a timely corrective action plan shall be determined seriously deficient, or if the original notice stated the entity was seriously deficient, the entity may be subject to termination in accordance with the provisions set forth in [Rule I].

(2) All corrective action plans are subject to review and approval by the department. If a corrective action plan is rejected by the department, a revised corrective action plan

that addresses the deficiencies in the original plan must be submitted to the department no later than 15 calendar days from the date of the notice of rejection of the original plan. Any entity that fails to submit an amended corrective action plan within 15 calendar days shall be determined seriously deficient, and may be subject to termination from the program.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE VII INFANT MEAL REIMBURSEMENT (1) All meal components required by the USDA infant meal pattern contained in 7 CFR 226.20, which is hereby adopted and incorporated into this rule, must be supplied by the child care provider, with the exception of breast milk, for a meal to be eligible for reimbursement. A copy of 7 CFR 226.20 (2002) is available from the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952.

(2) Except as provided in (6), meals containing breast milk served to infants may be claimed for reimbursement. Other required or optional meal components must be supplied by the child care provider. If the parent supplies any meal component other than breast milk, the meal may not be claimed for reimbursement.

(3) Meals containing only breast milk do not qualify for reimbursement if feeding is performed naturally by the mother.

(4) Except as provided in (6), infant formula must be supplied by the child care provider for the meal to be eligible for reimbursement. If parents provide infant formula, meals cannot be claimed.

(5) Except as provided in (6), a child care provider must provide an infant with iron-fortified formula or soy-based formula if recommended by the infant's parent or the infant's health care provider.

(6) If an infant requires a specialty formula such as nutramigen, pregestimil, alimentum, and lofenalac that is much more expensive or difficult to obtain than a regular infant formula, the provider may request that the parent pay the difference between a regular priced formula and the much higher priced formula. In lieu of receipt of cash, the provider may credit the parents for the value of the formula the provider would have supplied if the parents supply the special formula. A written agreement signed by both provider and the parent(s) indicating how specialty formulas shall be provided must be kept and must be available for review by CACFP staff and auditors.

(7) Whole milk is not allowed as a meal component for an infant who is 12 months or less of age.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE VIII COMBINATION FOODS (1) Each day care center or day care home shall list components of combination foods on

menus as required by the Montana CACFP. Combination foods include, but are not limited to the following:

- (a) chili (ground turkey/beans);
 - (b) chicken casserole (chicken/rice/broccoli); and
 - (c) tacos (soft tortilla/ground beef/cheese/lettuce and tomato).
- The provider is responsible for ensuring that combination foods provide adequate amounts of the required meal components for the age group being served.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE IX MENU EVALUATION (1) CACFP participants must ensure that all meals and snacks claimed for reimbursement meet all federal and state minimum standards in accordance with 7 CFR 226.20.

(2) Menu evaluations must be performed at least annually for the purpose of improving the nutritional content of meals served in day care facilities. Sponsoring organizations shall perform menu evaluations of each day care home participating in the CACFP through their sponsorship. The menu evaluation shall include review of menus served over the course of at least one month.

(3) All entities must monitor, verify, document, and ensure that only meals and snacks that meet federal regulations and state minimum standards are claimed for reimbursement.

(4) Acceptable documentation of the use of appropriate processed meat must be maintained. Acceptable documentation includes labels indicating nutritional specifics about the product(s) used. Without nutritional documentation, meals using processed meat will be disallowed. All documentation must be kept on site for review.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE X TRAINING AND TRAINING RECORDS (1) Each entity must provide free training to each day care home provider it sponsors under the CACFP. Initial training for each provider must occur before any meal or snack is served for which CACFP reimbursement is claimed. Thereafter, training sessions must be provided at least annually.

(2) An entity must document each training session by keeping on file:

- (a) an agenda which lists the date, time, and location of each training session and the topic or topics discussed;
- (b) the names of the training facilitator or facilitators and their qualifications;
- (c) the anticipated educational outcomes for each training session; and
- (d) a roster labeled with the course name and subject matter, signed by each training session participant.

(3) The following individuals must attend at least five hours per federal fiscal year of CACFP training provided by the

department:

(a) the CACFP program director from each type of independent center;

(b) one cook or nutrition coordinator from each independent center;

(c) the CACFP program director from each sponsoring organization sponsoring a child care center;

(d) one cook or nutrition coordinator from each sponsoring organization sponsoring child care centers; and

(e) at least one other staff person from each center sponsored.

(3) Each sponsor of day care homes must provide, free of charge, a minimum of five hours of training to the day care home providers it sponsors concerning CACFP requirements, including those relating to nutrition education, meal service, and food safety. The training to be provided by the sponsor must be submitted to the department in a written training plan and must be approved by the department. Sponsors shall provide the approved training frequently enough and in convenient locations so that day care home providers have a reasonable opportunity to participate in the training.

(4) Each sponsor must retain on site all information relating to training provided by that sponsor for a period of at least three years.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XI SPONSORING ORGANIZATIONS (1) The Montana CACFP sets geographical boundaries of operation for sponsors. Boundaries are set based on financial viability and need for services. Geographical boundaries follow county lines.

(2) In any area of the state where at least two day care home sponsors are currently available to all program participants, additional sponsor applications are not available.

(3) If a provider would be more efficiently served by a sponsor in an adjacent service area, the service areas may be adjusted if this arrangement is by mutual consent between the affected sponsors, and prior written approval is obtained from the department.

(4) An application for a new sponsorship of family day care homes includes the following:

(a) written acknowledgment of the criteria for family day care home (FDCH) organizations;

(b) an FDCH sponsor proposal; and

(c) an oral presentation.

(5) In order to be eligible to participate in the Montana CACFP FDCH, a prospective sponsor must demonstrate:

(a) need for the services to be performed;

(b) the service area to be served under the new sponsor's plan; and

(c) financial capability, accountability, and viability as well as capability in program operations.

(6) A prospective sponsor must complete the written

proposal, orientation training, oral presentation and Montana CACFP training and have been approved for each requirement before becoming a sponsoring organization. The prospective sponsor must be a non-profit organization maintaining a tax-exempt status with the internal revenue service.

(7) The prospective sponsor must submit a list of potential registered and operating day care providers who are not presently served by a FDCH sponsor in the planned area of operation in order to demonstrate need for the services to be provided.

(8) A sponsor may provide assistance to a day care home that has identified licensing or registration deficiencies, provided prior approval is obtained from the department.

(9) In the event that a sponsoring organization discontinues or becomes disqualified from continued participation in the CACFP, the day care homes being served by the terminating sponsorship shall be provided a list of alternative sponsoring organizations available in the service area. The day care homes shall be permitted 30 days to select a new sponsoring organization. If a day care home fails to select a new sponsor within 30 days, the department shall assign a new sponsor to be selected on a random basis from among those qualified in the service area.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE XII TIERING CHANGES (1) A sponsor shall claim meals for purposes of reimbursement for the day care homes under its sponsorship once per month for any one category of tiering.

(2) A change in tier status resulting from new data, such as census, income information, or elementary school information distributed for sponsor evaluation, is effective statewide the first day of the month during which the income information, census, or elementary school information is available to the sponsoring organization.

(3) A day care home may submit a request for a tier change evaluation to its sponsoring organization. If approved, the change will be effective as noted below:

(a) changes based on elementary school attendance area or census block are effective on the first of the month during which the evaluation request is received, except as provided in (3)(c);

(b) changes based on income fluctuations or relocation of the provider are effective on the first day of the month that the evaluation request is documented and verified; and

(c) a change made as a result of an investigation or to correct a tiering error will be retroactive to the date of the error.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE XIII PROVIDER ENROLLMENT (1) A sponsor shall

complete the following when enrolling a new day care home:

(a) performance of a pre-approval visit at the home prior to the home beginning participation in the CACFP. During the pre-approval visit, the sponsor must:

(i) determine that the home is operating as a day care home;

(ii) train the provider regarding CACFP requirements;

(iii) discuss documentation requirements, including posted menus, meals served and attendance records; and

(iv) discuss CACFP procedure, including records retention procedures, and provide training to ensure compliance.

(b) at the time of the pre-approval visit, obtain either:

(i) a copy of the registration certificate indicating the home is currently registered to provide day care services; or

(ii) written documentation from licensing staff indicating the provider has submitted all required information and has been approved for registration; or

(iii) documentation from licensing staff that a need exists for the use of administrative assistance from a CACFP sponsor which may be used to remedy registration deficiencies.

(2) If a registered day care home is approved by the sponsor during the pre-approval visit, an application and CACFP agreement may be completed and signed. The effective date to begin CACFP participation is the date the application and agreement are signed by the authorized signatories for both the sponsor and the day care home. If the day care home has not yet received a registration certificate from licensing staff, but has been approved by licensing, a screen print from the child care licensing system may be used as interim license verification. The screen print must show proof of registration and the effective date of the registration for the day care home to begin participation in the CACFP.

(3) If the location of a day care home changes:

(a) the provider may continue CACFP participation, provided a sponsor pre-approval visit at the new address is conducted within 10 business days following the first day of operation at the new location, the new site is determined acceptable for CACFP participation, and the new site is approved by licensing staff for the provision of child care;

(b) a new CACFP agreement must be signed by both the sponsor and provider and dated on the date of the pre-approval visit if the standards in (3)(a) are met at that time; and

(c) the tiering status of the home must be redetermined.

(4) If a sponsor misdates any document in order to manipulate or circumvent a rule, the sponsor's CACFP contract may be terminated.

(5) A sponsor shall not submit a claim for a day care home which is not registered or approved.

(6) Day care home providers must retain on file the following information:

(a) copies of the signed application and agreement;

(b) notification of reasons and procedures for termination; and

(c) pre-approval visit forms.

(7) If a provider moves or changes their legal name, a new application must be filled out and marked "CHANGE". The change must be identified as a change of status.

(a) If only meal times are changed, a "Meal Time Change" attachment is to be completed and sent in with the current month's claim.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XIV RECRUITMENT (1) A sponsoring organization shall not engage in active recruitment of a day care home if that home is participating in the CACFP under a current agreement with any sponsoring organization.

(2) A sponsoring organization may seek to enroll a day care provider that is not currently participating in the CACFP, or has not participated under an agreement for at least 30 days.

(3) If it is determined that a sponsoring organization has engaged in active recruitment, as defined in [Rule I], the recruiting sponsoring organization will be subject to disciplinary action.

(4) Disciplinary action may include the following:

(a) First violation, a letter of warning stating that a contract violation has occurred;

(b) Second violation, a letter warning that a second contract violation has occurred and indicating that the sponsoring organization is considered seriously deficient, and:

(i) the sponsor shall be required to submit a corrective action plan; and

(ii) the sponsor will not be restricted from recruiting new providers who are not currently participating in the CACFP under a current agreement with any other sponsoring organization.

(c) If more than two violations occur, the department will issue the sponsoring organization written notice that it is seriously deficient and that the department intends to terminate the CACFP contract.

(5) Simultaneous active recruitment of multiple providers will be treated as a single violation.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XV CHANGING SPONSORING ORGANIZATION (1) A day care provider may be enrolled with only one CACFP sponsoring organization at a time while participating in the CACFP.

(2) Each sponsoring organization must provide a copy of this rule to all participating providers upon enrollment.

(3) Except as provided in (5), a participating day care home may change sponsoring organizations according to these guidelines:

(a) a provider may change sponsoring organizations one time per year, the change to be effective the first day of the month following the notice provided in (3)(b). One time per year means once during the one year period beginning on the date

the provider last switched sponsoring organizations.

(b) to change sponsoring organizations, a provider must notify their current sponsoring organization of their intention to change sponsoring organization on or before the fifth working day of the month prior to the month in which the change to a new sponsoring organization is to be effective.

(4) A provider who fails to give timely notification to their sponsoring organization, as required by (3)(b), will continue to be under the current sponsor until the first day of the next later month.

(5) Any provider who is subject to and notified of corrective action by their current sponsoring organization may not change sponsoring organization until the provider has been restored to good standing for a minimum of one calendar month.

(6) A sponsoring organization is not obligated to sponsor any particular provider.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XVI ADMINISTRATIVE REVIEWS OF SPONSOR/SPONSORING ORGANIZATION OF DAY CARE HOMES

(1) The department will conduct at least one administrative review of each day care home sponsoring organization during each period consisting of two federal fiscal years (FFY) for sponsoring organizations with 100 homes. The department will conduct at least one administrative review of each day care home sponsoring organization during each period consisting of three FFYs for sponsoring organizations with less than 100 homes.

(2) The sponsoring organization must ensure that all program records are available during any administrative review. Program records include:

(a) documentation to substantiate that the procedures outlined in the sponsoring organization's current management plan have been and are being followed; and

(b) documentation of claims processed and fiscal activity for the three preceding years.

(3) During the administrative review of a sponsoring organization:

(a) if the sponsoring organization is found to be deficient and corrective action is required, the administrative portion of claims payments for that sponsoring organization may be withheld until the department verifies that the required corrective action is complete, up to a maximum of 45 days beyond the date of claim submission; and

(b) any request for income eligibility forms or any additional information requested by the department in a corrective action letter must be provided to the department within 30 days after the sponsoring organization receives the corrective action letter. All misclassified provider income eligibility forms must be corrected back to the date they were signed, or, in the case of tiering, correction must be made back to the date of the determination or the date first claimed.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE XVII ADMINISTRATIVE REVIEWS OF CENTERS AND SPONSORS OF CENTERS (1) The department will conduct one announced or unannounced visit in each three year period.

(2) Information that must be available at the time of the visit includes but is not limited to the following:

- (a) attendance records and sign in/out sheets;
- (b) food receipts, by month of purchase;
- (c) food service labor documentation;
- (d) food production records, including written evidence of specific food quantities prepared;
- (e) income eligibility forms;
- (f) menus;
- (g) milk receipts, by month of purchase;
- (h) monthly financial reports; and
- (i) staff training records.

(3) If the center is found to be deficient and corrective action is required, claims payment may be withheld up to 45 days while the department verifies that the required corrective action is complete.

(4) If milk purchases are less than 100% of the required amount as set forth in 7 CFR 226.20, the department may require the center to provide receipts to the department documenting the milk purchases for the subsequent three months. Claims will be adjusted proportionately if less than 100% of the required amount is documented. Continued shortages of milk may extend this documentation and adjustment process. In addition, the department may pursue other legal remedies.

(5) Meal record deficiencies in meal production records shall result in corresponding meal reimbursement disallowances. If records are incomplete or missing, the department may require the center to provide additional months of production records to the department with the submission of the center's future claims. If documentation is not supplied in accordance with the requests, payment shall not be made and claims will be returned as incomplete. If meal records are not available on site at the time of the review, meals will be disallowed. In addition, the department may pursue other legal remedies.

(6) Income eligibility forms that are corrected in response to a corrective action plan must be copied and submitted to the department with all related claims. Failure to attach corrected income eligibility forms may result in the claim being returned unpaid as incomplete.

(a) All mis-classified income eligibility forms must be corrected back to the date of the signature of the adult household member on the forms. A provider shall provide all income eligibility forms not available on site at the time of a review pursuant to a corrective action plan.

(7) A visit to a child care center may be conducted by the department's CACFP staff approximately 90 days after the child care center's enrollment date. The purpose of the 90-day visit is primarily educational and is intended to ensure that the

organization has established the appropriate files and procedures for successful CACFP operation.

(8) Each full month may be subject to an administrative review.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XVIII MILK PRODUCTION RECORDS (1) All administrative reviews and financial reviews performed by department staff and auditors under department contract will evaluate the milk purchase quantity documentation and compare it to the meals claimed that require a milk volume component.

(2) Notwithstanding any other rule, if enough milk is not purchased and documented to meet the minimum meal component milk volume requirement, a corresponding meal reimbursement disallowance shall be made. The milk volume requirements of 7 CFR 226.20 are hereby adopted and incorporated into this rule by reference. Copies of 7 CFR 226.20 (2002) are available from the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

RULE XIX RECIPES REQUIRED (1) All program providers must maintain documentation as to the creditability of baked goods as a bread/bread alternate.

(2) Each day care center or day care home shall maintain documentation of bread/bread alternate ingredients. Documentation may include a recipe, food label, or child nutrition (CN) label for the food item. This documentation is to be used to assess whether the primary ingredient (by weight) of the item is whole-grain and/or enriched flour and therefore creditable as a bread/bread alternate.

(3) Examples of recipes/food labels that should be kept on file include but are not limited to the following:

- (a) banana/carrot/zucchini bread;
- (b) brownies/bars;
- (c) cookies;
- (d) gingerbread; and
- (e) granola bars.

(4) It is the responsibility of the provider to ensure that all items claimed as bread/bread alternates meet the criteria listed in the grains/breads section of "Crediting Foods in Child and Adult Care Food Program". The August 2001 edition of "Crediting Foods in the Child and Adult Care Food Program" is hereby adopted and incorporated by this reference. A copy of the grains/breads section of "Crediting Foods in Child and Adult Care Food Program" is available from the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE XX HEAD START CATEGORICAL ELIGIBILITY (1) Head start children are categorically eligible for the CACFP if:

(a) the child is enrolled in the head start program on the basis of a determination that the child is a member of a family that meets the low-income criteria, including those children who are automatically eligible for a second year of head start based on low-income.

(2) For CACFP documentation purposes, the head start participants eligible for meal reimbursement may be listed with a statement certifying that they are enrolled in head start on an income eligible basis. This list is to be signed each month by a head start official authorized to act on behalf of the organization.

(3) Children who participate in head start, but who are not determined to be income eligible for head start, need to complete a CACFP income eligibility form in order to be considered for free or reduced price meals for CACFP.

(4) An alternative enrollment form may be used if the alternative enrollment form includes all of the information listed below provided the form has been approved by the state department. The information required by the alternative enrollment must include:

- (a) name of child;
- (b) adult signature and date of signature;
- (c) social security number of signing adult;
- (d) number of members in the household;
- (e) monthly or annual household income; and
- (f) determination of CACFP eligibility.

AUTH: Sec. 52-2-704, MCA
IMP: Sec. 52-2-704, MCA

RULE XXI TERMINATION AND RE-ENROLLMENT OF A DAY CARE HOME PROVIDER (1) When a sponsoring organization terminates a day care home provider for being seriously deficient and for cause, the sponsoring organization shall send a copy of the termination letter that is sent to the provider and to the department. Upon receipt of this notification, the terminated provider's name shall be added to the list of terminated providers and sent to all sponsors, and will be included on the national disqualified list.

(2) If a terminated provider wants to return to program participation the provider must fully and permanently correct the serious deficiency or the cause that precipitated termination, must provide proof that the provider is no longer listed on either the state or national disqualified list, and must contact the terminating sponsor and request re-enrollment.

(3) If the sponsor does re-enroll a provider who has been terminated for cause, the sponsor shall complete the following:

(a) notify the state CACFP of the re-enrollment in writing;

(b) visit the home at least twice per month for the first three months;

(c) complete a parent survey at least once in the first three months;

(d) during the second three months of re-enrollment, the sponsor must visit the home at least once a month; and

(e) complete a parent survey at least once in the second three months.

(4) An entity or provider terminating operations with the CACFP while under corrective action will still be placed on the national disqualified list as well as the state list.

AUTH: Sec. 52-2-704, MCA

IMP: Sec. 52-2-704, MCA

3. The Child and Adult Care Food Program (CACFP) is a federally-funded program administered jointly by the USDA and the Montana Department of Public Health and Human Services. The CACFP provides funds and nutritional training to child and adult day care providers in order to ensure that nutritious meals are served to those in care. Because the program is administered jointly by the federal and state governments, much of the governing authority is already in federal regulations. The following proposed new rules are intended to address state policies and/or options and are to be administered in conjunction with, rather than instead of the federal regulations.

RULE I DEFINITIONS

The proposed definitions rule defines the terminology used in the child and adult care food program (CACFP) and is necessary to clearly define the verbiage used throughout the rules. If definitions are not provided, constituents may become confused and communication may be difficult.

RULE II ADVANCES

The proposed advances rule is necessary to define the monetary limit of an advance payment for reimbursement to an institution. If the monetary limit is not provided, entities may not have sufficient information to determine and plan their budgets and operating costs. This may impact access to care.

RULE III AUDIT GRANTS

The proposed audit grants rule is necessary to inform entities under contract with the Department of Public Health and Human Services in the CACFP about potential grants available to entities that are required to have an audit. It explains the necessary procedures to obtain a reimbursement grant of audit expenses, and states how the amount of reimbursement will be calculated. If audit grants are not provided an entity could be out of compliance with program regulations and subject to

disciplinary action or termination. In addition the proposed rule will assist entities with their budgeting process. It will allow them to determine the monetary amount of grant reimbursement through the CACFP and plan what additional funds will be needed to pay for required audit expenses.

RULE IV CIVIL RIGHTS

The proposed civil rights rule is necessary for institutions under contract with the Department of Public Health and Human Services in the CACFP in order to ensure compliance with the federal regulations regarding non-discrimination, and the requirements addressing civil rights. If an entity is out of compliance with program regulations including civil rights requirements, the entity may be subject to disciplinary action or termination from the child and adult care food program. This could result in difficulties with access to care.

RULE V APPEALS AND FAIR HEARINGS

The proposed appeals and fair hearings rule is necessary to inform entities and day care homes participating in the CACFP of the circumstances under which they have the right to appeal. The rule explains the procedures and requirements for filing an appeal, and states the different conditions for Centers and Providers to appeal. Appeals are a matter of federal law and constitutional due process. Therefore, the proposed rule is also required in order to meet due process requirements.

RULE VI CORRECTIVE ACTION PLAN

The proposed Corrective Action Plan rule is necessary to inform participants under contract with the Department of Public Health and Human Services in the CACFP when deficiencies in their operation of the child and adult care food program result in a required corrective action plan. A corrective action plan must be submitted within certain time frames. The rule is also necessary to inform participants of the consequence of failing to submit a corrective action plan on a timely basis.

RULE VII INFANT MEAL REIMBURSEMENT

This proposed rule incorporates federal regulations into Montana ARM. It is necessary to inform participants that all meal components required by USDA must be provided by the provider except breast milk. Breast milk provided naturally by the mother is not creditable. The rule is also necessary to inform providers that it is allowable to charge the parent the difference in the price between regular formulas and specialty formulas, if a physician's written notice of a need for the formula is documented. In addition, whole milk is not allowed as a meal component for infants (12 months or less).

RULE VIII COMBINATION FOODS

This proposed rule is necessary in order to identify and ensure the creditability of combination foods. It specifies that separate components in combination foods must be documented separately so that those in care can be assured of nutritious meals meeting CACFP criteria.

RULE IX MENU EVALUATION

This proposed rule is necessary to ensure that menu evaluations are performed in accordance with federal regulations and to ensure that meals and snacks reimbursed through the CACFP meet all CACFP requirements. Menu evaluation and counseling are required for all CACFP participants to assure that all meals and snacks meet the required federal and state minimum standards. The proposed rule requires that a file of labels documenting nutritional specifics for processed meats is maintained. Again, these requirements are necessary to promote the health and nutrition of those in care.

RULE X TRAINING AND TRAINING RECORDS

The proposed rule is necessary to inform entities of the requirement to initially and annually provide CACFP training to each facility and staff for which they are responsible. This rule lists the required specifics of the documentation in order to effectively assure that the minimum needs are met locally regarding CACFP training.

RULE XI SPONSORING ORGANIZATION (SPONSOR) SERVICE AREAS

This proposed rule limits the number of sponsoring organizations and specifies the geographic limitations for sponsoring organizations service delivery areas. This rule is necessary to limit the number of sponsoring organizations in order to ensure their viability. It is also necessary to have two sponsoring organizations per area to allow child care providers a choice, but also to limit the competition among sponsoring organizations. The rule defines the application process for new sponsors in the event a current sponsor discontinues their contract with the department. The rule is also necessary so that the process to choose a new sponsoring organization is clearly understood by the public and to assure there is equity in choosing a new sponsoring organization. Failure to have a rule that defines this process could result in confusion, misunderstandings and potential liability.

RULE XII TIERING CHANGES

This proposed rule defines the limitations for sponsoring organizations regarding changing a child care provider's tier status. This rule is necessary so that the parameters regarding tiering are clearly defined in order to ensure that these limitations are applied consistently and fairly. Failure to

define the process regarding tiering changes could result in liability and a poor public perception of the program.

RULE XIII PROVIDER ENROLLMENT

This proposed rule outlines the steps necessary in order for a sponsoring organization to enroll a family child care provider in the CACFP. The rule is necessary in order to clearly define the process so that all child care providers are treated consistently and fairly. Failure to clearly define and enforce the steps may give an advantage to one child care provider over another and one sponsoring organization over another one. Since the Department is committed to fair and equitable administration of the program, the Department proposed the rule.

RULE XIV RECRUITMENT

This proposed rule defines the limitations for sponsoring organizations regarding the inability to actively recruit a family or group day care home to participate under a particular sponsorship unless the family or group day care home has not participated under an agreement for greater than 30 days. This rule is necessary so that the prohibition against active recruitment is clearly defined as well as the steps outlining disciplinary action should this rule be violated. Failure to clearly define and enforce this prohibition may lead to territorial disputes between the sponsoring organizations and could lead to access difficulties.

RULE XV CHANGING SPONSORING ORGANIZATIONS

This proposed rule defines the limitations for family child care home providers changing from one sponsoring organization to another. The rule is necessary to define these limitations clearly, so as not to give an advantage to one sponsoring organization over another. Failure to clearly define and enforce the limitations could result in day care providers that are without a sponsor or two sponsoring organizations billing for meals served by the same provider.

RULE XVI ADMINISTRATIVE REVIEWS OF SPONSORING ORGANIZATIONS OF FAMILY CHILD CARE HOMES

This proposed rule outlines the timing and the process for conducting reviews of sponsoring organizations of family child care homes. This rule is necessary to assure consistency in the implementation of administrative reviews and to inform the public about the process. The rule is also necessary to ensure that Montana's review procedures consistently comply with federal regulations.

RULE XVII ADMINISTRATIVE REVIEWS OF CENTERS AND SPONSORS OF CENTERS

This proposed rule outlines the timing and the process for conducting reviews of sponsoring organizations of family child care homes. This rule is necessary to assure consistency in the implementation of administrative reviews and to inform the public about the process. The rule is also necessary to ensure that Montana's review procedures consistently comply with federal regulations.

RULE XVIII MILK PRODUCTION RECORDS

This proposed rule assures that the minimum amount of milk is purchased and served to those in care by each provider in order to meet the minimum milk component required for CACFP creditability of breakfasts and lunches (per federal meal component requirements). Calcium deficiency has become a serious problem in America and the result is widespread osteoporosis among much younger age groups than have historically experienced this disease. The bones of the elderly are built up only in youth. Improving calcium intake among children can prevent this disease. Milk is the best source of easily absorbed calcium in the American diet. Consequently, the USDA and the Department are committed to insuring that milk is served to those in care in at least the minimum required quantity.

RULE XIX RECIPES REQUIRED

This proposed rule requires providers to document the required amount of whole or enriched grain ingredients in each serving of baked goods to ensure that the served food equals at least the corresponding amount of grain or wheat found in a standard slice of bread (or fraction thereof required by federal regulation). This allows providers the freedom to serve a much wider variety of baked goods as bread alternates, but still assures that the meals and snacks in which they are served are creditable for CACFP reimbursement. The rule also describes a simple form for documentation to make the documentation of grains and wheat easier.

RULE XX HEAD START CATEGORICAL ELIGIBILITY

This proposed rule outlines the criteria for Head Start categorical eligibility for the CACFP. This rule is necessary to assure consistency determining categorical eligibility for the CACFP and to inform the public about the process. Categorical eligibility for Head Start income eligible participants is a matter of federal law. So, the proposed rule merely ensures that the Department complies with federal regulations.

RULE XXI REINSTATEMENT OF TERMINATED CHILD CARE HOME PROVIDER

This proposed rule defines the criteria for sponsoring organizations to return terminated child care home providers to

the CACFP. This rule is necessary to assure consistency in allowing terminated family child care homes to return to the CACFP, so as not to give an advantage to one family child care home or one sponsoring organization over another. Furthermore, the Department is concerned about access to day care providers, and thus, is interested in providing motivation to all providers who are committed to quality care to participate in CACFP and to continue to provide good care and quality meals.

These proposed rules describe the policies of the Montana CACFP. They comply with the federal governing law and regulations. These rules do not expand the CACFP program and will not result in a change to available federal funds in support of the program. While these rules impact, potentially, all CACFP program participants, they do not result in changes to fees, costs or benefits to participants. The Department estimates that there are approximately 15,000 CACFP participants during any given month.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Kathy Munson, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on January 23, 2003. Data, views or arguments may also be submitted by facsimile (406)444-9744 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the)
amendment of ARM 37.86.3502,)
37.89.103, 37.89.114,)
37.89.115 and 37.89.118)
pertaining to mental health)
services plan covered)
services)

NOTICE OF PUBLIC HEARING
ON PROPOSED AMENDMENT

TO: All Interested Persons

1. On January 16, 2003, at 1:30 p.m., a public hearing will be held in the auditorium of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.86.3502 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, ELIGIBILITY (1) remains the same.

(2) "Severe disabling mental illness" means with respect to a person who is 18 or more years of age that the person meets the requirements of (2)(a), (b) or (c). The person must also meet the requirements of (2)(d). The person:

(a) remains the same.

(b) a DSM-IV diagnosis of:

(i) through (vi) remain the same.

(vii) ~~obsessive compulsive~~ compulsive disorder (300.3);

(c) through (d)(iv) remain the same.

AUTH: Sec. 53-2-201, 53-6-113 and 53-21-703, MCA

IMP: Sec. 53-6-101 and 53-21-701, MCA

37.89.103 MENTAL HEALTH SERVICES PLAN, DEFINITIONS As used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) through (14)(d)(vi) remain the same.

(15) "Severe disabling mental illness" means with respect to a person who is 18 or more years of age that the person meets the requirements of (15)(a), (b) or (c). The person must also meet the requirements of (15)(d). The person:

(a) through (18) remain the same.

AUTH: Sec. 41-3-1103, 52-1-103, 53-2-201, 53-6-113, 53-6-131, 53-6-701 and 53-21-703, MCA

IMP: Sec. 41-3-1103, 52-1-103, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-117, 53-6-131, 53-6-701, 53-6-705, 53-21-139, 53-21-202 and 53-21-701, MCA

37.89.114 MENTAL HEALTH SERVICES PLAN, COVERED SERVICES

(1) remains the same.

(2) Covered services for youth include:

(a) remains the same.

(b) primary care providers, as defined in ARM 37.86.5001~~(18)~~ (25), for screening and identifying psychiatric conditions and for medication management;

(c) a psychotropic drug formulary, as specified in ~~(6)~~ (7);

(d) remains the same.

(e) psychological assessments, treatment planning, individual, group and family therapy, and consultations performed by licensed psychologists, licensed clinical social workers, and licensed professional counselors for treatment of covered diagnoses in private practice or in mental health centers; and

~~(f) case management services for adults with severe disabling mental illness; and~~

(g) remains the same but is renumbered (f).

(3) Covered services for adults include:

(a) services provided by a licensed mental health center contracted with the department for services to adults enrolled in the plan;

(b) primary care providers, as defined in ARM 37.86.5001(25), for screening and identifying psychiatric conditions and for medication management;

(c) a psychotropic drug formulary, as specified in (7);

(d) medication management, including lab services necessary for management of prescribed medications medically necessary with respect to a covered diagnosis.

(3) through (6) remain the same but are renumbered (4) through (7).

~~(7)~~ (8) Except as provided in ~~(7)~~ (8)(a), the plan covers medically necessary mental health services for covered diagnoses for members who are residents of nursing facilities, regardless of whether the services are provided in the nursing facility.

(a) through (9)(c) remain the same but are renumbered (8)(a) through (10)(c).

~~(10)~~ (11) A member who is an inmate in or incarcerated in a correctional or detention facility is not entitled to services under the plan, except as specifically provided in these rules.

(a) The plan covers discharge planning services in

relation to a covered diagnosis prior to release from a correctional or detention facility for a member who is:

- (i) through (iii) remain the same.
- (iv) a forensic patient, as specified in ~~(7)~~ (8)(a), admitted to the Montana state hospital; or
- (v) through (12)(a)(ii) remain the same but are renumbered (11)(a)(v) through (13)(a)(ii).

AUTH: Sec. 41-3-1103, 52-1-103, 53-2-201, 53-6-113, 53-6-131, 53-6-706 and 53-21-703, MCA

IMP: Sec. 41-3-1103, 52-1-103, 53-1-405, 53-1-601, 53-1-602, 53-2-201, 53-6-101, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-6-706, 53-21-139, 53-21-202 and 53-21-701, MCA

37.89.115 MENTAL HEALTH SERVICES PLAN, PROVIDER PARTICIPATION (1) through (1)(b) remain the same.

(2) Providers in the following categories may request enrollment in the plan:

- (a) and (b) remain the same.
- (c) primary care providers, as defined in ARM 37.86.5001~~(18)~~ (25);

(d) through (4)(c) remain the same.

(i) The notice and hearing provisions of ARM 37.85.512 and 37.5.310 apply to a department overpayment determination under (4)(c).

(d) through (d)(ii) remain the same.

(iii) The notice and hearing provisions of ARM 37.85.512 and 37.5.310 apply to a department sanction determination under (4)(d).

(5) through (5)(c) remain the same.

(6) An enrolled provider shall be provided an opportunity for administrative review and fair hearing as provided in ARM ~~Title 37, chapter 2, subchapter 3 and 5~~ 37.5.310 to contest a denial of correct payment by the department to the provider for a service provided to a member if:

(a) through (7) remain the same.

AUTH: Sec. 2-4-201, 41-3-1103, 53-2-201, 53-6-113 and 53-21-703, MCA

IMP: Sec. 2-4-201, 41-3-1103, 53-1-601, 53-2-201, 53-6-113, 53-6-116, 53-6-701, 53-6-705, 53-21-202 and 53-21-701, MCA

37.89.118 MENTAL HEALTH SERVICES PLAN, AUTHORIZATION REQUIREMENTS (1) and (1)(a) remain the same.

(b) Services provided to adult members of the mental health services plan are exempt from the prior authorization provisions of ARM 37.88.101.

AUTH: Sec. 53-2-201 and 53-21-703, MCA

IMP: Sec. 53-2-201, 53-21-202 and 53-21-701, MCA

3. The Department of Public Health and Human Services is proposing the adoption of these amendments to make permanent the temporary emergency rules adopted by the Department effective

December 1, 2002 to reduce expenditures in the Mental Health Services Plan (MHSP). The MHSP is a state-funded program that provides comprehensive mental health services for persons in low income households who are not eligible for Medicaid. MHSP is not subject to Medicaid rules and regulations. The Department is proposing these amendments to limit services for adult members of the MHSP.

Under these proposed amendments, MHSP services to adults would be limited to services provided by licensed mental health centers that have contracted with the Department; to services of primary care providers for screening and identifying psychiatric conditions and for medication management; to a psychotropic drug formulary and medication management including lab services necessary for management of prescribed medications medically necessary with respect to a covered diagnosis.

The proposed rule amendments would eliminate the requirement that prior authorization be obtained for services provided to adult members of the Mental Health Services Plan. Finally, the proposed amendments clarify the definition of severe disabling mental illness.

ARM 37.89.114

The proposed amendments to this rule provide for separate arrays of services for youths and adults under the MHSP. These proposed amendments would limit services for adults enrolled in MHSP to those provided by licensed mental health centers who have a contract with the Department; to services provided by primary care providers as defined in ARM 37.86.5001(25) for screening and identifying psychiatric conditions and for medication management, and to laboratory services necessary to manage prescription drugs medically necessary to treat a covered diagnosis. Youths will have access to psychological assessments, treatment planning, individual, group and family therapy, and consultations performed by licensed psychologists, licensed clinical social workers, and licensed professional counselors for treatment of covered diagnoses in private practice or through mental health centers.

The Department will contract with mental health centers to provide services to adults under the MHSP for an amount that is capped at the level of expenditures for the previous year. This will allow the Department to accurately project costs for the remainder of SFY03. Although some individuals may experience a loss of services, those with the most severe mental illness will continue to have access to services through a mental health center or through their private primary care provider. The Department considered and rejected the alternative of eliminating the program entirely when the allocated funding is depleted. This would have had a far more destructive effect than the proposed amendments.

ARM 37.89.115

The Department is taking this opportunity to correct outdated cross references in this rule pertaining to hearing procedures applicable to MHSP providers. References to the hearing procedures were not corrected when the Department transferred, revised and renumbered its hearing rules from Title 46 to Title 37 effective June 30, 2000. The corrections are for administrative purposes only. They are intended to clarify the applicable hearing procedures and are not intended to substantively change MHSP providers' hearing rights.

ARM 37.89.118

The Department is eliminating the requirement for prior authorization of services for adult members of the MHSP. The proposed amendments to ARM 37.89.114 would limit the services to licensed mental health centers and primary care providers. Services previously requiring prior authorization included adult foster and group care, crisis stabilization and outpatient therapy when the number of sessions exceeds 24. Each of these services will now be provided through a licensed mental health center and reimbursement will be capped by contract. The Department will allow the mental health centers to manage the contract resources without oversight from the Department's utilization review contractor. The Department will retain the authority to conduct a retrospective review if it is indicated that services have been reimbursed without documented medical necessity. The Department considered and rejected the alternative of continuing to require prior authorization. The Department determined it was unnecessary to continue to incur the costs of this service.

ARM 37.86.3502 and ARM 37.89.103

The Department is taking this opportunity to propose amendments to the rules defining severe disabling mental illness (SDMI) to clarify the criteria for determining SDMI status. The amendments provide explanatory language making it clear that an individual who has ongoing functional difficulties because of mental illness can be determined SDMI if the person qualifies in at least one of three other categories as well. Some providers have interpreted the definitions as requiring that an individual must have been hospitalized at least 30 consecutive days at Montana State Hospital because of a mental disorder in order to be determined SDMI. The amended rules make it clear that hospitalization is not the only way to qualify for SDMI status.

Fiscal Impact

The Department expects these proposed rules to reduce state general fund expenditures for the MHSP by \$500,000 in SFY03. This is accomplished by limiting projected expansion of the MHSP for the remainder of SFY03.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on January 23, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF PUBLIC HEARING
amendment of ARM 42.14.101,) ON PROPOSED AMENDMENT
42.14.102, 42.14.104, 42.14.105,))
42.14.106, 42.14.107, 42.14.108,))
42.14.109, and 42.14.111))
relating to lodging facility))
use taxes))

TO: All Concerned Persons

1. On January 16, 2003, at 8:30 a.m., a public hearing will be held in the Fourth Floor Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.14.101, 42.14.102, 42.14.104, 42.14.105, 42.14.106, 42.14.107, 42.14.108, 42.14.109, and 42.14.111 relating to lodging facility use taxes.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue not later than 5:00 p.m., January 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 5805, Helena, Montana 59604-5805; telephone (406) 444-2855; fax (406) 444-3696; or e-mail canderson@state.mt.us.

3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

42.14.101 DEFINITIONS The following definitions apply to this sub-chapter:

- (1) through (7) remain the same.
- (8) "Outfitting facility" means a facility that may:
 - (a) use one or more permanent structures, one or more of which have running water, sewage disposal, and a kitchen;
 - (b) furnish sleeping accommodations to guests; or
 - (c) offer hunting, fishing, or recreational services in conjunction with the services of an outfitter; ~~or~~
 - ~~(d) is a small establishment or a seasonal establishment.~~
- (9) and (10) remain the same.
- (11) "Rental agreement" is an agreement between an owner or operator and a user. Such an agreement provides lodging to the user for a specified period of time in exchange for a specified payment amount.

(11) remains the same but is renumbered (12).

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-101, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.101 to delete the reference to (1)(d) because it is hard to define what constitutes a "small establishment" and "seasonal establishments" are not referenced in the law. The department is defining the term "rental agreement" so owners and operators of facilities impacted by these rules will have a clear understanding of what is intended by the term "rental agreements" as they apply to ARM 42.14.103.

42.14.102 WHO MUST COLLECT THE TAX AND FILE RETURNS

(1) remains the same.

(2) To determine taxability of a facility, the owner or operator should consider the type of operation.

If the operation is a:

Use Step:

- | | |
|-----------------------------------------------------------------------------------|-------------|
| Hotel, motel, hostel, public lodginghouse
or bed and breakfast facility | (a) and (b) |
| Resort, condominium inn, dude ranch,
guest ranch facility, outfitting facility | (c) |
| Campground | (d) |
| Dormitory | (e) |

(a) Compute the average daily accommodation charge (ADAC). If the ADAC is less than 60% of the allowable state reimbursement for the standard cost of in-state lodging, and the facility is a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility, no further step is required. The owner or operator of the facility is not required to collect the tax. The exemption applies only to a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility.

(b) If the ADAC is more than 60% of the allowable state reimbursement for the standard cost of in-state lodging, and the facility is a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility, the second step is to look to the length of the rental period of the lodging facilities.

(i) If it is rented solely for 30 days or more the lodging facilities are not taxable.

(ii) If it is rented for less than 30 days the lodging facilities are taxable unless specifically exempted by ARM 42.14.103.

(c) If the facility is a resort, condominium inn, dude ranch, guest ranch, or outfitting facility, look at the length of the rental period of the lodging facilities as stated above in (2)(b)(i) and (ii).

(d) If the facility is owned or operated by a non-profit or religious organization and the lodging facilities are rented primarily to youth under 18 years of ages for camping, no further step is needed. The facility is exempt from the tax. If not, look at the length of the rental period as stated above in (2)(b)(i) and (ii).

(e) If the facility is a dormitory and the lodging facilities are rented to users enrolled in a regular academic program or a program of continuing education, no further step is needed. Charges for the lodging facilities are exempt. See ARM 42.14.103. If not, the tax must be collected on the accommodations charges.

<u>Some Examples:</u>	<u>Taxable</u>
Health facility	No
Religious Camps - primarily for youth	No
- occasionally for youth	Yes
Youth hostel	Yes
Federal campground	Yes
Campground - overnight trade	Yes
- permanent space	No
Rooms rented to government employees	Yes
Dormitory - lodging facilities rental to non-enrolled students	Yes
- lodging facilities rental to enrolled students	No

(3) Every owner or operator of a facility shall be liable for all amounts required to be collected as a tax under the provisions of Title 15, chapter 65, MCA, and with respect thereto the owner or operator shall be considered a taxpayer.

(4) An taxpayer owner or operator of a facility has the right to request a hearing on a tax liability as provided in 15-1-705, MCA.

(5) If the tax or any portion of the tax is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7, MCA.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 2-18-501, 15-65-101, and 15-65-111, and 15-65-112, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.102 to specify the parties that have a right to request the hearing as provided in 15-1-705, MCA. The rule currently states that a "taxpayer" may request the hearing but that term is not defined in this chapter. The term "owner or operator of a facility" is defined and the rule should reflect that only the "owner or operator of the facility" may request the hearing.

42.14.104 MULTIPURPOSE FACILITIES (1) A lodging facility ~~use tax for a room~~ used for a purpose other than lodging (such as a meeting rooms) ~~are~~ is not subject to the tax.

(2) A lodging facility ~~use tax for a room~~ used for lodging and another purpose is subject to the tax.

(3) Rooms supplied with beds are presumed to be rented for purpose of lodging unless the contrary is conclusively established by the owner or operator.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-111, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.104 to delete the term "use tax" because that term is not used in the statute and has created some confusion with the public. The other amendments are general housekeeping amendments that are a result of the biennial review of this chapter, as required by 2-4-314, MCA.

42.14.105 COMBINED CHARGE FOR SERVICES (1) When lodging facility use taxes are combined with food, beverage, recreation, or other charges which are a substantial portion of the charge, the owner or operator may allocate the lodging facility use tax using one of the following:

(a) A a flat rate of the allowable state reimbursement for the standard cost of in-state lodging per each day per for each person;

(b) 25 twenty-five percent of all charges per each day per for each person; or

(c) A a charge justified by reasonable documentation.

(2) An owner or operator must substantiate and itemize each charge and provide these charges for review.

(3) Lodging facility use taxes do not include separately stated service charges which are not an integral part of the use or occupancy of the room or campground space, such as:

(a) separately stated telephone_i

(b) television_i

(c) food_i

(d) beverage_i or

(e) personal laundry charges.

~~(3)~~ (4) The department may disallow an owner or operator's method of allocating the lodging facility use tax under (1) above if:

(a) the department has reasonable cause to believe that the method of allocation was chosen solely to qualify the facility for a tax exemption ~~on the basis of the ADAC. In such cases, the department will select a method of allocating the lodging facility use tax that reasonably reflects the lodging facility use tax for comparable facilities. as provided in 42.14.103; or~~

(b) a charge allocated under (1)(c) is not supported by reasonable documentation or itemization.

~~(4)~~ (5) Lodging facility use taxes ~~do~~ include amounts charged for bathhouse facilities or temporary use of tangible personal property used in conjunction with the room, such as a charge for an extra bed.

~~(5)~~ (6) ~~In the case of where~~ If campgrounds charges for water, electrical or sewer hookups, and bathhouse facilities, those charges are included in the amount that is subject to tax.

(7) If the facility charges for electricity as a separate or additional charge, this charge must be included in the amount that is subject to the tax.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 2-18-501, and 15-65-111, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM

42.14.105 to clarify how the lodging facility tax will be calculated. The other amendments are general housekeeping amendments. The department determined the need for the amendments while conducting its biennial review of this chapter, as required by 2-4-314, MCA.

42.14.106 FACILITY REGISTRATION (1) Every owner or operator required to impose the lodging facility use tax must register and file an application for a state identification number on the form provided by the department for each facility owned/ or operated in Montana.

(2) Any owner or operator who has acquired the business of another facility shall not use ~~his~~ the predecessor's state identification number. The owner or operator must register before the due date of the first report. This applies to both new businesses and businesses which have been purchased.

(3) through (5) remain the same.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-114, MCA

REASONABLE NECESSITY: As a result of the department's biennial review of this chapter the department is proposing to amend ARM 42.14.106 to correct grammatical errors.

42.14.107 QUARTERLY REPORTS AND PAYMENTS - DUE DATES

(1) Every owner or operator is required to make, for each calendar quarter or portion of a quarter in operation, a report to the Department of Revenue, Mitchell Building P.O. Box 5805, Helena, MT, 59620 59604-5805. The report must include gross lodging facility use taxes.

(2) The owner or operator shall remit the amount of ~~said~~ this tax with the quarterly report. The report will cover quarterly periods ending March 31, June 30, September 30, and December 31, and must be postmarked no later than the last day of the month following the close of the quarter. Reports must be made on forms supplied by the department.

(3) If ~~no a tax is was not~~ collected, the report should so state.

(4) ~~No extension of time for remittance of lodging facility use tax proceeds may be granted by the department~~ The department may not grant an extension to remit the tax.

(5) and (6) remain the same.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-112, 15-65-114, and 15-65-115, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.107 to correct the mailing address for the department and make minor grammatical amendments.

42.14.108 PENALTIES AND INTEREST (1) The Upon request, the penalty may be waived pursuant to ARM 42.3.101 through 42.3.114, and 42.3.120.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-114 and 15-65-115, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.108 to clarify that a request must be made in order for the penalty to be waived.

42.14.109 RECORDS REQUIRED - AUDIT (1) Each owner or operator of a facility shall maintain records necessary to document gross receipts ~~from~~ for lodging facility use tax. ~~For example:—an An~~ owner or operator may be required to substantiate gross receipts reported for a particular quarter. ~~Reconstruction of For audit purposes, the owner or operator may be required to reconstruct~~ the reported gross receipts from the original lodging facility use tax receipts ~~will be required for audit purposes.~~

(2) through (4) remain the same.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-113, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.109 as general housekeeping amendments.

42.14.111 SUMMARY REPORT REQUIRED (1) The department shall provide the department of commerce a quarterly report, within 90 days of the close of a quarter, of the tax collected within:

(a) ~~within~~ the city limits of cities and consolidated city-counties;

(b) ~~within~~ the counties; and

(c) ~~within~~ tourism regions.

(2) The department of commerce must notify the department of any tourism boundary change 30 days before prior to the end of the quarter.

AUTH: Sec. 15-65-102, MCA

IMP: Sec. 15-65-121, MCA

REASONABLE NECESSITY: As required by 2-4-314, MCA, the department is proposing to amend ARM 42.14.111 as general housekeeping amendments.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to:

Cleo Anderson
Department of Revenue
Director's Office
P.O. Box 5805
Helena, Montana 59604-5805

and must be received no later than January 24, 2003.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is

available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State December 16, 2002

BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 2.55.320)
pertaining to classifications)
of employment and 2.55.327A)
pertaining to construction)
industry premium credit)
program)

TO: All Concerned Persons

1. On October 17, 2002, the Montana State Fund published a notice of the proposed amendment of the above-stated rules at page 2710 of the 2002 Montana Administrative Register, issue number 19.

2. The Montana State Fund Board of Directors has amended ARM 2.55.320 and 2.55.327A exactly as proposed.

3. No comments or testimony concerning the rules were received.

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Herb Leuprecht
Herb Leuprecht
Chairman of the Board

/s/ Dal Smilie
Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State December 16, 2002

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of new rules relating to the)
adulteration of fertilizers)
and soil amendments by heavy)
metals)

TO: All Concerned Persons

1. On October 31, 2002, the Department of Agriculture published notice of the proposed adoption of new Rule I, ARM 4.12.620 and new Rule II, ARM 4.12.621 concerning the adulteration of fertilizers and soil amendments by heavy metals at page 2959 of the 2002 Montana Administrative Register, Issue Number 20.

2. The agency has adopted new Rules I and II, ARM 4.12.620 and 4.12.621 with the following changes, stricken matter interlined, new matter underlined:

4.12.620 ADULTERATION OF FERTILIZERS AND SOIL AMENDMENTS BY HEAVY TRACE METALS (1) and (2) remain as proposed.

(3) Fertilizers and soil amendments, whether waste-derived or not, that contain guaranteed amounts of phosphates or micronutrients, except as exempted within this section, are adulterated when they exceed the levels of metals established by the following table:

Metals	ppm per 1% of P ₂ O ₅	ppm per 1% of Micronutrients
Arsenic (As)	13	112
Cadmium (Cd)	10	83
Lead (Pb)	61	463

(a) Fertilizers and soil amendments such as compost, manures and manipulated manures or other organic matter, separately or in combination with sewage sludge, even those products making nutrient claims, are exempt from the table above, but are adulterated when the levels of arsenic, cadmium or lead exceed the levels permitted in 40 CFR 503.

(b) These standards are not to be used to evaluate growing media claiming nutrients, but may be applied to the sources of the nutrients added to the media.

~~(a)~~(c) Micronutrients can include iron, manganese, zinc, copper, molybdenum, boron, cobalt and selenium.

~~(b)~~(d) To use the table:

(i) multiply the percent guaranteed P₂O₅ or sum of the guaranteed percentages of all micronutrients in each product by the value in the appropriate column in the table to obtain the maximum allowable concentration (ppm) of these metals;

- (ii) the minimum value for P_2O_5 utilized as a multiplier shall be 6.0;
 - (iii) the minimum value for micronutrients utilized as a multiplier shall be ~~one~~ 1.0; and
 - (iv) if a product contains both P_2O_5 and micronutrients, multiply the guaranteed percent P_2O_5 by the value in the appropriate column and multiply the sum of the guaranteed percentages of the micronutrients by the value in the appropriate column. Utilize the higher of the two resulting values as the maximum allowable concentrations.
- (4) through (6) remain as proposed.
- (7) Testing methodology used by the department in analyzing metal content for the end product will be for the intent of discovering the total metal content of a fertilizer or soil amendment product. Such methodology includes laboratory test results from either sample preparation method 3050B or 3051A as described in US EPA Publication SW-846 (~~Revision 3, third edition, update III, December 1996~~) or other comparable methods approved by the department.
- (8) through (10) remain as proposed.

AUTH: 80-10-301, MCA
IMP: 80-10-205, MCA

4.12.621 REGISTRATION (1) remains as proposed.

- (2) The registrant of a fertilizer or soil amendment containing waste as defined in ARM 4.12.620(4)(a) and (b) shall state in the application for registration the source of the waste and the level of metals in the end product including, but not limited to, arsenic, cadmium, and lead for sewage sludge and cadmium for solid waste. Upon request by the department, the registrant shall provide ~~a laboratory report or other documentation~~ analytical data necessary to verify the levels of metals requested determine compliance with 40 CFR 257 or 503. This information can be provided by the registrant from documentation collected and compiled by the waste generator.
- (3) The registrant of a hazardous waste-derived fertilizer or soil amendment as defined in ARM 4.12.620(4)(c) shall state in the application for registration the source of the waste and the level of metals within the source, including, but not limited to, arsenic, cadmium, and lead. Upon request by the department, the registrant shall provide a ~~laboratory report or other documentation~~ analytical data necessary to verify the level of metals requested determine compliance with 40 CFR 261, 266 and 268. This information can be provided from documentation collected and compiled by the waste generator.
- (4) ~~The levels of metals reported within and Tthe methods used to determine these levels~~ comply with (2) and (3) shall be consistent with and comply with the standards as stated below:
- (a) remains as proposed.

(b) Recyclable materials that are not hazardous waste, but used in the manufacture of fertilizers and soil amendments shall comply with the treatment standards specified in 40 CFR 257 and or 503, using testing methods for total metal content found in EPA Publication SW-846.

(5) remains as proposed.

(6) The Montana department of agriculture hereby adopts and incorporates by reference 40 CFR 257, 261, 266, 268 and 503, regarding solid waste, hazardous waste and sewage sludge management, as published on December 27, 2002. The department hereby adopts and incorporates by reference EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," (SW-846), third edition, update III, December 1996 ~~September 1986~~. A copy of these regulations can be obtained by contacting the department at 303 N. Roberts, Helena, Montana, 59620-0201.

(7) remains as proposed.

AUTH: 80-10-301, MCA

IMP: 80-10-201 and 80-10-205, MCA

3. The following comments were received and appear with the Department of Agriculture responses:

COMMENT 1: A public hearing was held on November 26, 2002. The department received nine written comments, two of which were presented at the public hearing. Appearing at the public hearing were Pam Langley of the Montana Agri Business Association and Michelle Nutting of Agrium, Inc. The proponents who submitted written comments and did not appear at the hearing were the Montana Grain Growers Association, Mountain View Co-op, Montana Farm Bureau and the JR Simplot Company. Six of the nine written comments were proponents of these new rules and require no response. Three other written comments also supported the proposed rules, but had concerns about specific language. These comments appear below with the Montana Department of Agriculture's responses:

RESPONSE 1: The department recognizes and appreciates the comments.

COMMENT 2: A written statement was received from Dr. Vincent Snyder, a representative of The Scotts Company from Marysville, Ohio. Dr. Snyder stated that the proposed standards listed in ARM 4.12.620(3) for phosphorus and trace elements are incorrectly applied as standards for compost, manipulated manures and similar materials that declare nutrients. He stated that the risk assessments conducted to establish risk-based concentrations (RBC) for phosphorus and micronutrient fertilizers were not conducted for nutrient sources contained within an organic matrix. He stated that the Association of American Plant Food Control Officials (AAPFCO) recognized this within the Standard Uniform Interpretation and Policy (SUIP) #25 footnotes when they

adopted language to regulate non-nutritive metals in products derived from compost, manure and bio-solids, even those making nutrient claims, with standards contained in 40 CFR 503.

RESPONSE 2: The department agrees with Dr. Snyder that 40 CFR 503 standards are the appropriate standards for non-nutritive metals in products made from organic materials, even those making nutrient claims. Although ARM 4.12.620(4)(a) regulates such products when they contain sewage sludge, it does not cover products that do not contain sewage sludge or products that make a nutrient claim. Therefore, the department has amended ARM 4.12.620 by inserting new subsection (3)(a) so that products consisting of organic materials are regulated by standards based on appropriate risk-based assessments. Additionally, this amendment is consistent with AAPFCO's SUIP #25.

COMMENT 3: Dr. Snyder's second comment was similar in concern, only in respect to potting soils. He stated that potting soils with a nutrient charge would be regulated as a fertilizer under these proposed regulations. His comment is that potting soils are not used under the same conditions as traditional fertilizers, are not re-applied year after year, the RBCs in the SUIP #25 table were not developed for these types of products and therefore, potting soils should not be regulated by the same standards as phosphate and micronutrient fertilizers. The potting soil (final product) should be exempt and only the nutrient charge added to a potting soil be regulated by these standards as outlined in AAPFCO's SUIP #25 footnotes.

RESPONSE 3: The department agrees with this comment and has amended ARM 4.12.620 by adding new subsection (3)(b). The addition of this amendment promotes uniformity and consistency with AAPFCO's SUIP #25. It also addresses the use of incorrect risk assessments for organic matrices by exempting potting soils.

COMMENT 4: A written statement was received from James M. Skillen, a representative of Responsible Industry for a Sound Environment (RISE) from Washington, DC. Mr. Skillen's first comment pertains to the same issue of Dr. Snyder's second comment, for different reasons. Mr. Skillen states that methodologies used to analyze mixtures of inorganic fertilizers and compost or potting soils present a difficult analytical challenge that chemists have yet to meet at this date. And therefore, potting soils (final product) should be exempted and only the fertilizer charge per se should be regulated under the standards presented within the table of ARM 4.12.620(3).

RESPONSE 4: The department agrees that the current analytical methods used to analyze products containing both inorganic and organic materials present a difficult challenge.

The department, therefore, agrees with the request and has added subsection (3)(b) to exempt the final product of potting soils and compare only the fertilizer charge per se to the standards within ARM 4.12.620(3). The department will review recommendations by AAPFCO as additional information and updates are gathered on trace metals and analytical methods.

COMMENT 5: Mr. Skillen's second comment pertains to 4.12.621(2) and (3) where the department may ask a company "to verify the levels of metals requested." Mr. Skillen states that the department needs to inform the registrant what confidence interval (i.e. 85%, 90%, 95%, etc.) is acceptable to "verify" the level of metals in the finished product. He also states that the registrant should not be required to "verify" because this would require a comprehensive sampling plan to evaluate the characteristics of the finished product.

RESPONSE 5: The department's intention is not necessarily to require additional testing by the registrant, but for the registrant to provide the data collected and maintained by the waste generator. Regarding the level of metals within the end product, this information can be calculated by the registrant from data generated by the waste generator; or, provided from actual data of subsequent tests. This information will be used by the Montana department of environmental quality to determine compliance with 40 CFR 257 or 503. The documentation requested would be consistent with information already exchanged between the waste generator and the Environmental Protection Agency (EPA) in accordance with CFR Title 40 and the EPA SW-846. To clarify this exchange of information, we have amended ARM 4.12.621(2), (3) and (4).

COMMENT 6: Mr. Skillen also stated that the department should drop all references to adopting the entire EPA SW-846 and only reference the specific test methods from the most recent edition of the Association of Official Analytical Chemist (AOAC) or the Association of Fertilizer Phosphate Chemist (AFPC) because methods referenced within EPA SW-846 are not appropriate for fertilizer products.

RESPONSE 6: At this time, nationally recognized methods for determining levels of trace metals in fertilizers are not available. However, the 3050B and 3051 methods referenced in SW-846 are designed to digest the total potentially leachable metals from soil-type matrices and they represent a scientifically sound starting point for the fertilizer matrix. Method 3050B is presently under investigation by a group of regulatory and industry scientists as a potential digestion method for fertilizers and is currently in use by some regulatory agencies. The department's intent is to use only proven methods that have successfully passed the scientific scrutiny of regulatory agencies and industry.

The department justifies the full adoption of SW-846 because the entire document is needed to explain the Quality Assurance/Quality Control (QA/QC) procedures for waste generators before submitting data to EPA. Also, the Montana Administrative Procedure Act requires that the department, in order to enforce such procedures for waste generators, reference these procedures in the department rules. Therefore, the department has not made any changes in regard to this comment.

COMMENT 7: A written statement was received from William C. Herz, a representative of The Fertilizer Institute from Washington, DC. Mr. Herz's first comment was that the department should adopt SUIP #25 in its entirety, including footnotes.

RESPONSE 7: The department respectfully disagrees and did not adopt SUIP #25 in its entirety. However, the department believes our rules are consistent in principle with AAPFCO's SUIP #25 except for the listing of the additional six trace metals. The department has chosen to prioritize the three metals of concern within Montana. The department has modified the SUIP #25 language into Montana rule format to clarify certain sections for Montana constituents and regulators. Also, as a service to Montana and its constituents, the department will review additional information on trace metals and analytical methods as it is gathered and recommendations are updated by AAPFCO.

COMMENT 8: A second comment received from Mr. Herz was that the department should adopt the official AAPFCO definition of adulteration.

RESPONSE 8: The department considered this definition, but determined it to be too broad relative to our goal of establishing standards for trace metals. Furthermore, a verbal comment was received during the drafting process that under the AAPFCO definition of adulteration, any nutrient could be considered an adulterate if eutrophication occurred through leaching or run-off. Therefore, the department decided to define adulteration of fertilizers by trace metals only, at this time.

COMMENT 9: The department identified a number of technical language clarifications to improve consistency throughout the rules.

RESPONSE 9: The department has made the changes shown below.

4.12.620 ADULTERATION OF FERTILIZERS AND SOIL AMENDMENTS BY HEAVY TRACE METALS Within the catchphrase, the word "HEAVY" was replaced with "TRACE" in response to a comment received from staff. The word "trace" is the more appropriate

industry term. In (7), the department replaced "revision 3" with "third edition, update III." This revision was made to clarify and update the appropriate reference.

4.12.621 REGISTRATION In (2), the department added "containing waste" to describe a fertilizer or soil amendment, for clarification of the waste-derived fertilizer or soil amendment. In (4)(b), the department replaced the word "and" with the word "or." This is to clarify fertilizer and soil amendment products must comply with the appropriate regulations and not both unless both apply. In (6), the department added "update III" to be consistent with changes made within ARM 4.12.620; replaced "September 1986" with "December 1996" to update to the appropriate reference and to be consistent with changes made within ARM 4.12.620.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck

Ralph Peck
Director

/s/ Tim Meloy

Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 4.12.1428 relating to)
produce assessment fees)

TO: All Concerned Persons

1. On October 31, 2002, the Department of Agriculture published notice of the proposed amendment of ARM 4.12.1428 relating to produce assessment fees at page 2956 of the 2002 Montana Administrative Register, Issue Number 20.

2. The agency has amended ARM 4.12.1428 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck

Ralph Peck
Director

/s/ Tim Meloy

Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption)	NOTICE OF ADOPTION,
of NEW RULES II through XVIII,)	AMENDMENT AND REPEAL
the amendment of 17.8.101,)	
17.8.110, 17.8.309, 17.8.310,)	
17.8.316, 17.8.342, 17.8.818,)	(AIR QUALITY)
17.8.825, 17.8.826, 17.8.901,)	
17.8.904, 17.8.905, 17.8.906,)	
17.8.1004, 17.8.1005,)	
17.8.1106, 17.8.1109,)	
17.8.1201, 17.8.1204,)	
17.8.1205, 17.8.1220,)	
17.8.1224, and 17.8.1226, and)	
the repeal of 17.8.701,)	
17.8.702, 17.8.704 through)	
17.8.707, 17.8.710, 17.8.715)	
through 17.8.717, 17.8.720,)	
and 17.8.730 through 17.8.734)	
pertaining to the issuance of)	
Montana air quality permits)	

TO: All Concerned Persons

1. On August 15, 2002, the Board of Environmental Review published a notice of public hearing on the proposed adoption, amendment and repeal of the above-stated rules at page 2076, 2002 Montana Administrative Register, issue number 15.

2. The Board did not adopt new rule I. The Board has adopted new rules III (17.8.743), V (17.8.745), VI (17.8.748), VIII (17.8.752), IX (17.8.755), X (17.8.756), XI (17.8.759), XII (17.8.760), XIII (17.8.762), XV (17.8.764), XVI (17.8.765), XVII (17.8.767), and XVIII (17.8.770), amended 17.8.101, 17.8.309, 17.8.310, 17.8.316, 17.8.342, 17.8.825, 17.8.826, 17.8.901, 17.8.904, 17.8.905, 17.8.906, 17.8.1005, 17.8.1106, 17.8.1109, 17.8.1201, 17.8.1204, 17.8.1205, 17.8.1220, 17.8.1224 and 17.8.1226, and repealed 17.8.701, 17.8.702, 17.8.704 through 17.8.707, 17.8.710, 17.8.715 through 17.8.717, 17.8.720 and 17.8.730 through 17.8.734 exactly as proposed. The Board has adopted new rules II (17.8.740), IV (17.8.744), VII (17.8.749) and XIV (17.8.763) and amended 17.8.110, 17.8.818 and 17.8.1004 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

RULE II (17.8.740) DEFINITIONS For the purposes of this subchapter:

(1) through (5) remain as proposed.

(6) "Facility" means any real or personal property that is either stationary or portable and is located on one or more contiguous or adjacent properties under the control of the same owner or operator ~~that contributes or would contribute to~~

air pollution, and that emits or has the potential to emit any air pollutant subject to regulation under the Clean Air Act of Montana or the Federal Clean Air Act, including associated control equipment that affects or would affect the nature, character, composition, amount, or environmental impacts of air pollution and that has the same two-digit standard industrial classification code. A facility may consist of one or more emitting units.

(7) remains as proposed.

(8) "Modify" does not include routine maintenance, repair, or replacement but means:

(a) construction or changes in operation at a facility or emitting unit for which the department has issued a Montana air quality permit under this chapter, except when a permit is not required under [NEW RULE ~~IV V~~ (ARM 17.8.745)];

(b) construction or changes in operation at a facility or emitting unit for which a Montana air quality permit has not been issued under this chapter but that subjects the facility or emitting unit to the requirements of [NEW RULE ~~II III~~ (ARM 17.8.743)];

(c) construction or changes in operation at a facility or emitting unit that would violate any condition in the facility's Montana air quality permit, any board or court order, any control plan within the Montana state implementation plan, or any rule in this chapter, except as provided in [NEW RULE ~~IV V~~ (ARM 17.8.745)];

(d) through (15)(b) remain as proposed.

RULE IV (17.8.744) MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS (1) A Montana air quality permit is not required under ARM 17.8.743 for the following:

(a) through (e) remain as proposed.

(f) emergency equipment installed in industrial or commercial facilities for use when the usual sources of heat, power, or lighting are temporarily unobtainable or unavailable and when the loss of heat, power, or lighting causes, or is likely to cause, an adverse effect on public health or facility safety. Emergency equipment use extends only to those uses that alleviate such adverse effects on public health or facility safety.; ~~A permit is not required for emergency equipment as long as the facility was unable to reasonably predict the event that caused the emergency;~~

(g) through (i) remain as proposed.

(j) temporary process or emission control equipment, replacing malfunctioning process or emission control equipment, and meeting the requirements of ARM 17.8.110(7) through (9); or

(k) remains as proposed.

RULE VII (17.8.749) CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT (1) through (3) remain as proposed.

(4) The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit ~~does not operate or~~ is not expected to

operate in compliance with applicable rules, standards, or other requirements:

(a) through (8)(c) remain as proposed.

RULE XIV (17.8.763) REVOCATION OF PERMIT (1) through (4) remain as proposed.

~~(5) This rule does not apply if the department determines that a permittee's request for the revocation of a portion of its permit is not an administrative amendment in accordance with [NEW RULE XV].~~

17.8.110 MALFUNCTIONS (1) through (7)(b)(iv) remain as proposed.

(8) If construction, installation, or use of temporary replacement equipment under (7)(a) and (b) constitutes a major modification and subjects a major stationary source to the requirements of ARM Title 17, chapter 8, subchapters 8, 9, or 10, the source must comply with the requirements of the applicable subchapter prior to construction, installation, or use of the temporary replacement equipment.

(9) Any source that constructs, installs, or uses temporary replacement equipment under (7)(a) shall comply with the following conditions:

(a) through (e) remain as proposed.

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in ARM 17.8.819 through 17.8.827 have been met. A major stationary source or major modification exempted from the requirements of subchapter 7 under ARM 17.8.744 or 17.8.745 shall, if applicable, still be required to obtain a Montana air quality permit and comply with all applicable requirements of this subchapter

(2) through (7) remain as proposed.

17.8.1004 WHEN MONTANA AIR QUALITY PERMIT REQUIRED

(1) Any new major stationary source or major modification which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall obtain from the department a Montana air quality permit prior to construction in accordance with subchapters 7 and 8 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ARM 17.8.744 or 17.8.745 which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national

ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall, prior to construction, still be required to obtain a Montana air quality permit and comply with the requirements of, ARM 17.8.748, 17.8.749, 17.8.756, 17.8.759 and 17.8.760, and any other applicable requirements of this subchapter.

(2) remains as proposed.

3. The following comments were received and appear with the Board's responses:

New Rule I

COMMENT No. 1: The Board received comments supporting inclusion of the proposed preamble in New Rule I. These commentors stated that the preamble is necessary because it sets the framework for the proposed rule. Other regulations in Montana contain preambles or purpose statements, and it is appropriate to include this preamble in the air quality permitting rules. As a matter of policy, and considering the current budget crisis facing this state, an efficiently administered air quality permitting program is necessary, and it is appropriate to express this policy in the rules, themselves.

COMMENT NO. 2: Another commentor stated that it would be inappropriate to include a provision in the rules stating that the rules will ensure that all applicable federal air quality regulations are met (New Rule I(1)(c)), so the provision should not be adopted.

RESPONSE: The Board has deleted the purpose statement, because the Secretary of State's office staff has indicated that purpose statements are unnecessary in administrative rules. Also, the manner in which the purpose statement is written makes it unclear whether or not its provisions are substantive. The statement of reasonable necessity included in the notice of proposed rulemaking sufficiently states the Board's rationale for adopting the new rules, and the purpose statement or preamble is unnecessary. Also, the proposed purpose statement could be interpreted as containing substantive requirements, such as the requirement that the program be administered to provide efficient allocation of resources for the benefit of all parties.

New Rule II(1)

COMMENT NO. 3: EPA commented that the change from "shall" to "may" in the BACT definition [New Rule II(1)] is inconsistent with the federal definition of BACT (40 CFR 51.166(b)(12)), and appears to be a relaxation of existing rules in the SIP. EPA stated that this could be addressed by

revising the rule to indicate that it does not apply to major source permitting.

COMMENT NO. 4: Other commentors expressed general opposition to adding language stating that this definition does not apply to other subchapters.

RESPONSE: The Board has not made the suggested revision. The language was changed to conform to Montana's current bill-drafting requirements, and was not intended to change the meaning of, or relax, existing rules in the SIP. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter."

New Rule II(2)

COMMENT NO. 5: EPA commented that the new rules do not clearly indicate how they apply to major source permitting. The definition of "construct" or "construction" in New Rule II(2) includes the phrase "a reasonable period of time for startup and shakedown." Because of this phrase, New Rule II(2) is not consistent with the same term used in major source permitting. EPA commented that the Board should revise this definition to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

COMMENT NO. 6: Other commentors expressed general opposition to adding language stating that this definition does not apply to other subchapters.

RESPONSE: The Board has not made the suggested revision. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter". Therefore, the definition of "construct" or "construction" would not apply to subchapters 8, 9 or 10, and the additional language is unnecessary.

New Rule II(6)

COMMENT NO. 7: EPA commented that, in the definition of "facility" in New Rule II(6), the phrase "that contributes or would contribute to air pollution" may not be as restrictive as the phrase "that emits or has the potential to emit air pollution." EPA stated that someone may emit air pollution but believe they do not contribute to air pollution. Therefore, the phrase "that contributes or would contribute to air pollution" should be replaced with "that emits or has the potential to emit air pollution."

COMMENT NO. 8: Another commentor agreed with EPA, stating that the phrase "that contributes or would contribute to air pollution" is a far more subjective determination than the original language, "that emits or has the potential to emit."

RESPONSE: The Board agrees that a facility should be regulated if it has the potential to emit air pollution, even if it does not cause or contribute to air pollution, and has changed the language as shown above.

New Rule II(14)

COMMENT NO. 9: EPA commented that, in New Rule II(14), the definition of "routine maintenance, repair, or replacement", does not clearly indicate how it applies to major source permitting. EPA commented that, for major source permitting, determining whether an action constitutes routine maintenance, repair, or replacement is case-specific and the term cannot be generally defined. Based on past determinations, routine activity has a narrow scope and, generally, applies only to actions that are regular, customary, and repetitious and undertaken as standard practice to maintain a facility in its present condition. The determination of whether a proposed modification is "routine" must take into consideration the nature, extent, purpose, frequency and cost of the work, as well as any other relevant factors. EPA commented that the proposed definition for "routine maintenance, repair, or replacement" would not assure that all appropriate factors are considered, and the definition should be revised to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

COMMENT NO. 10: Another commentator agreed with EPA's comments, stating that this should be a narrowly-defined provision where determinations are made on a case-by-case basis.

COMMENT NO. 11: Another commentator stated that EPA's suggested language should not be included. The commentator stated that the definition is not mutually exclusive with a case-by-case review, and that the definition would provide specific guidance while still allowing flexibility for a case-by-case determination. The commentator stated that, under EPA's approach, an action might clearly be "routine maintenance," as defined under subchapter 7, but be considered a modification requiring a PSD or nonattainment area NSR permit under subchapters 8 through 10.

RESPONSE: The Board has not made the suggested revision. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter". Therefore, the definition of "routine maintenance, repair, or replacement" would not apply to subchapters 8, 9 or 10. If there was an express provision in subchapters 8, 9, or 10 that was different from the provisions of subchapter 7, the suggested additional clause might be appropriate. However, there is no contrary provision, and the suggested language is not necessary.

NEW RULE III

COMMENT NO. 12: The U.S. Environmental Protection Agency (EPA) commented that it could not approve New Rule III (sections (2)-(5)), which would allow certain construction activities prior to issuance of a permit. EPA commented that these provisions are inconsistent with Section 110(a)(2)(C) of the Clean Air Act and 40 CFR 51.160, including 40 CFR 51.160(b), which requires states to have legally enforceable procedures to prevent construction or modification of a source if it would violate any control strategies in the state implementation plan (SIP) or interfere with attainment or maintenance of the national ambient air quality standards (NAAQS).

EPA commented that the table provided to the Board, entitled "States Allowing Pre-Permit Construction," and which identifies several states with rules that allow pre-permit construction activities, does not support approval of New Rule III, sections (2)-(5), into the SIP. EPA commented that three of the states (Idaho, Michigan and Utah) require administrative approval by the state before construction can begin (Idaho's DEQ issues written approval to the owner or operator that makes potential to emit limits requested by the owner or operator enforceable, Michigan's Commission may grant a waiver from the construction permit prior to full construction approval, and Utah's executive secretary issues an "approval order" (a permit) prior to construction). EPA commented that Minnesota's rule applies only to "de minimis" permit modifications (the rule includes pollutant thresholds for the criteria pollutants), and New Jersey's rule allows pre-permit construction only if not prohibited by Federal Law (N.J. Admin. Code 7-27-22.3(oo)(2)). EPA commented that Oklahoma's rule pertains to major source operating permits (Title V). The Oklahoma rules contain numerous restrictions and limitations to ensure that minor permit modifications do not violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS (OAC 252:100-8-7.2(b)(1)(A)(I)(I-V). EPA commented that it planned to research the implications of the North Dakota rule.

COMMENT NO. 13: Another commentator supported the provisions. This commentator stated that Montana winters are long and the construction season is short. Industry should have the opportunity to conduct limited construction activities during the season while a permit is pending. The rule allows only limited construction and requires that a complete application already be submitted to the Department. The commentator stated that the applicant undertakes the construction at its own risk, and the Department always retains the authority to halt the construction if it believes construction would violate any emissions standard or other rule.

COMMENT NO. 14: Another commentor stated that the language allowing the Department to halt construction activity in New Rule III(3) would require the Department to prove that the proposed project would result in a violation of the SIP or would interfere with the attainment or maintenance of any federal or state ambient air quality standard and that irrefutable evidence would be impossible to establish. Instead, the provision should state that the Department may require cessation of construction if: "DEQ has reason to believe the proposed project may result in a violation of the SIP or may interfere with the attainment or maintenance of any federal or state ambient air quality standard."

RESPONSE: The Board has adopted the rule as proposed. The construction season in Montana is relatively short, and facilities must pour concrete and undertake other construction while weather allows. Current rules prohibit any construction without first securing a permit, and the owner or operator has to timely secure that permit in order to meet its construction deadlines. While owners and operators should plan their permit applications accordingly, it is not unusual for issuance of a permit to be delayed beyond their control.

The new rule does not allow pre-permit construction if some other permit or rule prohibits such activities. For example, if a source needs a Prevention of Significant Deterioration (PSD) permit, both federal and state regulations require that the applicant secure the permit before undertaking any construction. Nothing in this rule would supersede these existing restrictions in other rules. The applicant would only be able to undertake limited pre-permit construction if it did not need a PSD permit as well. The applicant must have submitted an application and received a completeness determination from the Department prior to undertaking the construction. In addition, the Department has the ability to halt construction should it determine that the proposed project would result in a violation of the state implementation plan or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.

At least seven states allow some form of limited pre-permit construction. Two of these states, Utah and North Dakota, are in EPA Region VIII.

EPA Region VIII has asked Montana to defer rulemaking on this issue until the matter is addressed on a national level as part of reform of the federal NSR rules. However, EPA has no plans at present to do so, and it may be years before the issue is addressed nationwide.

New Rule III(1)(b)

COMMENT NO. 15: EPA commented in opposition to New Rule III(1)(b), which would exclude from the permit requirement asphalt concrete plants, mineral crushers and mineral screens that have the potential to emit more than 15 tons per year of

any airborne pollutant, other than lead, regulated under the air quality rules. EPA commented that the existing ARM 17.8.705(1)(o) requires a permit for these same sources when they have the potential to emit more than 5 tons per year, and that the proposed new rule would be a relaxation of the existing SIP.

RESPONSE: The Board has not made the suggested revision. The new rule is intended to make the requirement consistent with the other permitting thresholds in the subchapter and is more stringent than federal requirements. The asphalt concrete plants, mineral crushers, and mineral screens currently being permitted will still require an air quality permit. Therefore, the number of these facilities required to obtain permits will not be fewer. Also, this rule is more stringent than the previous, EPA-approved rule, because the permitting threshold for mineral screening operations has been lowered from 25 tons per year to 15 tons per year.

NEW RULE IV(1)(f)

COMMENT NO. 16: A commentor stated that owners and operators should plan for emergencies. Simply allowing them to avoid planning for those emergencies because they occurred suddenly is unacceptable. The burden should be on the owner or operator to prove that they were unable to predict the emergency event that resulted in increased air pollution. The Department would then have discretion to determine whether the facility should have planned better, and whether the failure to plan had an impact that deserves an enforcement action. Predicting the future is not perfect but it should be encouraged. Likewise, the failure to even attempt to reasonably foresee possible emergencies should be discouraged.

COMMENT NO. 17: Another commentor supported removal of this language. The commentor stated that the remainder of the rule makes it clear that the exclusion is narrowly drawn and available only when the loss of power "causes, or is likely to cause, an adverse effect on public health or facility safety." Asking a facility to also demonstrate that it could not have reasonably predicted the emergency is too burdensome and could further jeopardize safety. In an emergency situation, the owner or operator needs to take the steps necessary to secure the facility, not worry about whether they are first required to obtain a permit.

RESPONSE: The Board has not adopted the last sentence of proposed (1)(f) of NEW RULE IV and has amended the rule as shown above. The proposed rule, without the conditional exemption, would allow the Department to take enforcement action against an owner or operator who installs equipment under this provision and uses it in non-emergency situations. This exclusion is narrowly drawn and available only when the loss of power "causes, or is likely to cause, an adverse

effect on public health or facility safety." Asking the owner or operator to also demonstrate that they could not have reasonably predicted the emergency is too burdensome and could further jeopardize safety. In an emergency situation, the owner or operator needs to take the steps necessary to secure the facility, not worry about whether they are first required to obtain a permit. An exemption from permit requirements for emergency equipment in situations when the owner or operator could have predicted the event causing the emergency would require reassessment of permitting determinations potentially years after they have been made.

COMMENT NO. 18: EPA commented that New Rule IV(1)(f), a general exclusion from permitting for emergency equipment installed in industrial or commercial facilities, does not clearly indicate how it applies to major source permitting. EPA commented that, because there would not be any restrictions on size or emissions or the duration of time emergency equipment could be used, emergency equipment excluded from permitting in subchapter 7 could be a major source subject to major source permitting. EPA commented that this exclusion should be revised to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

COMMENT NO. 19: Other commentors expressed general opposition to adding language stating that this exclusion does not apply to other subchapters.

COMMENT NO. 20: Another commentor agreed with EPA's comments, stating that there should be limitations on the size, emissions and duration of time emergency equipment is used.

RESPONSE: The Board has not made the revisions suggested in Comment No. 20. The exclusion for emergency equipment is merely a clarification of the existing rule, which has been approved by EPA. This exclusion applies only when it is necessary to use emergency equipment to alleviate threats to public health or facility safety, and emissions from emergency equipment would not adversely effect the environment.

New Rule IV(1)(i)

COMMENT NO. 21: A commentor stated that it is illogical to exempt any facility from permitting requirements that has a potential to emit more than 25 tons per year. This is not fair to all of the other facilities that have the potential to emit between 25-100 tons per year.

RESPONSE: The Board has adopted the rule subsection as proposed. This provision is found in the existing rules, and the proposed rule makes the provision even more stringent than the existing rule, which has been approved by EPA.

New Rule V

COMMENT NO. 22: EPA commented that New Rule V could allow violations of major and minor source preconstruction permitting requirements, as well as the SIP.

COMMENT NO. 23: Another commentor stated that the de minimis rule (ARM 17.8.705(1)(r)) was incorporated, as it currently exists, into New Rule V. The Board should not change the proposed new de minimis rule, which merely restates the existing rule, which was adopted after intense public participation and debate.

RESPONSE: The Board has adopted the rule as proposed. In its 1999 de minimis rulemaking, the Board submitted a response to EPA's concerns that may be summarized as follows: "The de minimis rule would not allow violations of major source permitting requirements. The rule contains a provision, ARM 17.8.705(1)(r)(i)(B), that specifies that any construction or changed conditions of operation at a facility that would constitute a modification of a major stationary source is not considered a de minimis action." The Department is awaiting EPA's final action on the previously submitted de minimis rule, which is not being significantly changed in this rulemaking. The rule also contains provisions that do not allow violation of applicable ambient air quality standards or other rules.

New Rule VI(4)(i)

COMMENT NO. 24: A commentor suggested that the Board define the term "shakedown procedures," used in New Rule VI(4)(i).

RESPONSE: The board has not made this suggested revision. The Board does not believe that it is necessary to define "shakedown" procedures in New Rule VI(4)(i) because these procedures are described in each permit application.

New Rules VII(2) and XIII(2)

COMMENT NO. 25: EPA commented that New Rules VII(2) and XIII(2), which would allow for a 5-year extension of the specified effective date for a permit or a 3-year upper limit on the expiration date of a permit when construction or installation has not occurred, respectively, would not clearly indicate how they apply to major source permitting and would be inconsistent with requirements for major source permitting. EPA commented that PSD requirements in 40 CFR 52.21(r)(2) specify that a PSD permit expires after 18 months and that New Rules VII(2) and XIII(2) should be revised to indicate that they do not apply to sources subject to subchapters 8, 9 or 10.

COMMENT NO. 26: Another commentor expressed general agreement with EPA's comments.

COMMENT NO. 27: Other commentors expressed general opposition to adding language stating that these provisions do not apply to other subchapters.

RESPONSE: The Board has not made the suggested revision. The Department requires an updated BACT analysis and any other appropriate analysis before extending or reissuing a permit. The one-year to three-year construction commencement requirement in New Rule XIII(2) is sufficient to implement Montana's BACT requirement for minor sources. ARM 17.8.819 contains requirements applicable to BACT determinations for PSD permits that are sufficient to meet the requirements of 40 CFR 52.21(r)(2) and 51.166(j)(4). The rules have been made more stringent by adding the three-year time limit for commencement of construction. This will not replace PSD requirements for PSD sources (i.e., the 18-month limit applies to PSD sources but not to non-PSD sources).

New Rule VII(4)

COMMENT NO. 28: A commentor stated that the following underlined language in New Rule VII(4) may create an ambiguity that could be construed to allow or even require the department to withhold or condition a permit based on prior compliance issues completely unrelated to the permit being issued: "The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit does not operate or is not expected to operate in compliance with applicable rules, standards, or other requirements." The commentor stated that this issue was raised in a permit appeal a year ago based on similar language in ARM 17.8.710(4) and that the Department's position was that permitting and enforcement are separate functions and the Department could not condition or reject a permit based solely on past compliance issues. The hearing examiner in that appeal agreed, and deleting the language in question would clarify this issue.

COMMENT NO. 29: Another commentor stated that the burden should not be on the Department to prove that an "emitting unit does not operate or is not expected to operate in compliance with applicable rules, standards, or other requirements." The burden should be placed on the owner or operator. The Department should not issue a permit unless the applicant proves that the emitting unit does operate in compliance with the rules, standards and other requirements. The commentor stated that deleting the language that allows the Department to consider a facility's failure to comply with air quality laws in the past would be shortsighted and potentially environmentally damaging. The Department would be remiss in its duties to maintain and improve a clean and

healthful environment if it failed to look at a facility's compliance record. Past non-compliance could very well indicate the inability to comply in the future.

RESPONSE: The Board has deleted the language in question as shown above. Permitting and compliance are separate functions, and past compliance is not presently a factor in issuance of a new permit. The clarification is consistent with current implementation. The Department will still be required to determine whether the applicant has adequately demonstrated that the proposed new or altered emitting unit is expected to operate in compliance with applicable requirements.

New Rule VII(5)

COMMENT NO. 30: EPA commented in opposition to New Rule VII(5), which would provide for identification of "state-only" conditions in a Montana air quality permit that would not be federally enforceable. EPA commented that, currently, terms in permits issued under a SIP-approved permit program (e.g., permits issued under subchapter 7) are federally enforceable. EPA commented that, before it could approve this provision, a justification as to why certain provisions do not warrant federal (and citizen) review and enforceability would need to be submitted with the rule revision. EPA commented that the state should also demonstrate in the submittal that the proposed state-only terms would not hamper the ability of the state to enforce the SIP-approved aspects of NSR permits. EPA questioned the types of provisions the state would consider as being not federally enforceable, and EPA stated that, without more details on how this particular change would be implemented, EPA has potential backsliding concerns under Section 110(1) of the Federal Clean Air Act.

COMMENT NO. 31: Another commentor stated that, when the Department issues an operating permit to a major source, it identifies the rules that are "state-only" and that are not federally enforceable. The commentor stated that these are rules that the state has adopted of its own accord, that are not subject to EPA interpretation, guidance, or oversight, and that are not included in the SIP. The proposed rules would include a provision similar to that currently found in the operating permit rules whereby the Department specifically identifies state-only rules in the permit. These are rules adopted by the state that do not require federal approval and that are not necessary for federal approval of the state's program, so these rules should be enforceable only at the state level. The commentor stated that Montana could have adopted a completely separate permitting program for state-only rules, and that such a permitting program would not be subject to EPA approval. However, requiring applicants to secure another permit for state-only permits would be

undesirable and would not be an efficient approach to the permitting process.

RESPONSE: The Board has not made the suggested revision. The Board has adopted certain requirements that are more stringent than federal requirements and that are designed to protect Montana's environment by addressing its own unique needs. These rules are not intended to be part of the SIP and intentionally have not been submitted to EPA for inclusion in the SIP. State standards that are stricter than federal standards do not compromise the integrity of the SIP, and "backsliding" will not occur. The Board does not believe it is necessary to adopt a separate permitting program for these conditions, and believes it is appropriate to place them in air quality permits issued by the Department. During the permitting process, EPA and other concerned persons will have the opportunity to ensure that the Department correctly applies the state-only designation.

New Rule XI

COMMENT NO. 32: EPA commented that it is concerned that the rules would provide for only a 15-day public review of preliminary determinations on permits. This timeframe is too short for the public and EPA to provide comments, particularly for complex permitting actions.

EPA commented that it approved the existing 15-day comment period into the SIP over 20 years ago. Although EPA regulations normally require that SIPs include a 30-day comment period for permit actions, federal regulations (40 CFR 51.161(b) and (c)) provide discretion to approve a shorter comment period when existing state rules already included a comment period less than 30 days. EPA exercised this discretion in approving Montana's 15-day comment period. However, this short comment period has caused EPA problems on a number of occasions. EPA has found it difficult to adequately review and comment on the Department's preliminary permit determinations, particularly when complex issues have been involved or when EPA has had misunderstandings with the state. EPA stated that, given its own difficulties, EPA questions whether this comment period provides adequate opportunity for comment by other federal agencies, other affected states, and the public. EPA noted that, when the Board proposed revisions to the permitting rules on February 14, 2002, EPA expressed concerns regarding the 15-day comment period and asked that it be lengthened to 30 days.

EPA commented that it recently received a petition from Environmental Defense and Land and Water Fund of the Rockies that, among other things, alleges that the 15-day comment period is inadequate and demands that EPA issue a SIP call requiring the state to revise the comment period to at least 30 days. EPA stated that it has not made a decision yet regarding this request for a SIP call or any other aspect of

the petition, but the current rulemaking offers an opportunity to resolve this concern.

EPA commented that it understands the 15-day comment period may be considered necessary due to the Montana statutory requirement that a final decision be made within 60 days after receipt of a complete permit application. EPA stated that it does not believe this time constraint should dictate the length of the public comment period because it is essential that adequate opportunity for public comment be provided regardless of state-imposed deadlines on permit issuance. EPA stated that it also questions whether 60 days is adequate to complete complex permitting actions. EPA stated that its regulations (40 CFR 51.166(q)) require only that a preliminary determination on a PSD permit be issued within one year after receipt of a complete permit application, and EPA's experience indicates that permit applications often raise complex issues that require significantly more than 60 days to adequately address. EPA stated that it recognizes that a change to the 60-day period may require legislative action.

COMMENT NO. 33: Another commentor stated that the rules do not envision that EPA or members of the public wait until issuance of a preliminary determination before taking part in the permit process. As soon as an application for a permit is filed, the applicant must publish notice of the application. The application and any supporting documents are available to the public while the Department undertakes its completeness determination. If the public has concerns about the permit application then, they can share those concerns with the Department. By the time the preliminary determination is issued, forty days or more after the application is filed, interested parties should be very familiar with the issues raised by the permit. The commentor stated that, for these reasons, 15 days is a reasonable time within which to provide formal comments. The commentor also stated that the 15-day public comment period is a large issue that may require a legislative solution outside of the scope of this rulemaking. It should not be separated out and changed without regard to the total permitting schedule. This is not the appropriate occasion for a selective change.

COMMENT NO. 34: Another commentor stated that it objects to the excessively short 15-day public comment period on preliminary determinations for permits and the 15-day appeal period for a final decision. The commentor stated that it is clear that the federal PSD program requires a longer public comment period. A maximum of 15 days to comment on complex technical, legal and scientific aspects of permit applications is simply insufficient.

RESPONSE: The Board has not made the suggested revision. 40 CFR 51.161(c) states that: "Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for

permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements." The 15-day comment period in the proposed rule is the same as in the existing rule, which has been submitted to, and approved by, EPA. The preconstruction permitting process begins with submittal of an application and publication of a legal notice by the applicant. Notice of permit applications is placed on the Department's web site, providing additional opportunities for public participation. The Department has 30 days in which to determine whether an application is complete. If it is incomplete, the Department notifies the applicant, who must correct the deficiencies and resubmit the application, and the 30-day review period begins again. During the review periods, the public may submit comments to the Department. Following the 30-day completeness review period, the Department must issue its preliminary determination (PD) on the application. The PD is a draft permit that is available for comment during a period not to exceed 15 days from the date it is mailed. The PD is also available on the Department's web site. When the comment period has ended, the Department issues its final decision, which must be made within 60 days after the permit application was submitted. The decision is not final until 15 days have elapsed without a request for a hearing on the decision. If such a request is filed, the final decision is stayed until the conclusion of the hearing and the issuance of a final decision by the Board. The Board believes there is ample opportunity for public participation in the permitting process.

New Rule XIV

COMMENT NO. 35: EPA commented that, under New Rule XIV, which would allow the Department to "revoke a permit or any portion of a permit upon written request of the permittee", applicable provisions might be inadvertently revoked at the request of the permittee. EPA commented that the proposed rule should be revised to indicate that permittee-initiated revocations can be approved only if the provisions to be revoked are not applicable requirements of subchapters 7, 8, 9 or 10.

COMMENT NO. 36: Other commentors expressed general opposition to adding language stating that this provision does not apply to other subchapters.

RESPONSE: The Board has not made the suggested revision. It is appropriate to revoke portions of permits that are no longer applicable due to changing conditions at the facility. While some portion of a permit may be revoked, the permit as a whole still must meet any underlying applicable regulations. Also, unless partial revocation meets the requirements for an administrative amendment, the Department will be required to follow the procedures for new permits or permit modifications.

New Rule XIV(5)

COMMENT NO. 37: A provision was added to New Rule XIV, which states that partial permit revocation procedures that do not provide for public participation apply only when partial permit revocation constitutes an administrative amendment.

The Department opposes inclusion of the provision. Partial permit revocations are not administrative amendments, and they generally address removal of emitting units from a facility. The partial permit revocation revokes the facility's permission to operate that emitting unit and removes associated permit conditions.

RESPONSE: The Board agrees and has deleted New Rule XIV(5).

New Rule XV(1)

COMMENT NO. 38: EPA commented that, although New Rule XV(1)(b) would allow administrative amendments to permits only when there is no increase in emissions, EPA is concerned that some administrative permit amendments should be subject to public review. Concerning amendments that would not affect emission limits, EPA suggested revising the rule to indicate that the Department may make an administrative amendment " . . . provided the amendment does not violate any requirement of an applicable statute, rule or State Implementation Plan or effect [sic] the enforceability of an emissions limit" EPA commented that changes could affect the enforceability of an emissions limit, for example, changes in testing and monitoring methods, frequency of testing, and reporting requirements. EPA commented that it also suggests public review requirements for administrative amendments that result in decreases in emissions. EPA commented that any amendment that decreases an emission limit, for example, to create a synthetic minor source or to avoid other requirements, should go through public review for the limit to be federally enforceable.

COMMENT NO. 39: Other commentors expressed general opposition to adding language stating that this provision does not apply to other subchapters.

RESPONSE: The Board has not made the suggested revisions. The language in the proposed rule is the same as in the current, EPA-approved, rule. It is not necessary to grant EPA or the public appeal rights for administrative amendments that have no substantive effects on the permit or the environment. If EPA or the public believe they have been substantively affected by the Department's action on an administrative amendment, they have judicial remedies.

New Rule XVI(3)

COMMENT NO. 40: EPA commented that, under New Rule XVI(3), which would allow transfer of ownership and/or location of a permit if the Department does not approve, conditionally approve, or deny the transfer within 30 days after receipt of a notice of intent to transfer, a source may inappropriately relocate in an area that would jeopardize attainment of the NAAQS. EPA commented that the rule should be revised to read that the transfer would be deemed approved "except for transfers of locations to areas where a source could cause or contribute to violations of the NAAQS."

RESPONSE: The Board has not made the suggested revision. Permits for portable sources are written in such a manner as to comply with applicable requirements regardless of location of the source. Because no substantive requirements are involved, approval of a permit transfer is not necessary.

COMMENT NO. 41: EPA identified changes that needed to be made to internal reference cites in New Rules II and IV and in ARM 17.8.110, 17.8.818 and 17.8.1004.

RESPONSE: The Board agreed and has made the amendments as shown above.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, December 16, 2002.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 17.8.302 pertaining to)
incorporation by reference of)
hazardous air pollutants) (AIR QUALITY)
emission standards)

TO: All Concerned Persons

1. On August 15, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rule at page 2124, 2002 Montana Administrative Register, issue number 15.

2. The Board has amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, December 16, 2002.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 17.8.601, 17.8.604,)
17.8.605, 17.8.606, 17.8.610,)
17.8.612 and 17.8.614) (AIR QUALITY)
pertaining to open burning)

TO: All Concerned Persons

1. On August 15, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rules at page 2118, 2002 Montana Administrative Register, issue number 15.

2. The Board has amended ARM 17.8.604, 17.8.606, 17.8.610, 17.8.612 and 17.8.614 exactly as proposed. The Board has amended ARM 17.8.601 and 17.8.605 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.8.601 DEFINITIONS (1) through (1)(a)(x) remain as proposed.

(b) For essential agricultural open burning, prescribed wildland open burning, conditional air quality open burning, commercial film production open burning, Christmas tree waste open burning, or ~~any other~~ minor open burning during September, October, or November, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800) 225-6779.

(c) For essential agricultural open burning, prescribed wildland open burning, conditional air quality open burning, commercial film production open burning, Christmas tree waste open burning, or ~~any other~~ minor open burning during December, January, or February, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800) 225-6779.

(2) through (6) remain as proposed.

(7) "Open burning" means combustion of any material directly in the open air without a receptacle, or in a receptacle other than a furnace, multiple chambered incinerator, or wood waste burner, with the exception of ~~combustion of~~ detonation of unexploded ordnance, small recreational fires, construction site heating devices used to warm workers, or safety flares used to combust or dispose of hazardous or toxic gases at industrial facilities, such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants or elemental phosphorus plants.

(8) through (11) remain as proposed.

17.8.605 SPECIAL BURNING PERIODS (1) through (1)(g) remain as proposed.

- (h) any minor open burning that is not prohibited by ARM 17.8.604 or that is allowed by ARM 17.8.606.
(2) remains as proposed.

3. The following comments were received from the U.S. Environmental Protection Agency and appear with the Board's responses:

COMMENT NO. 1: The revisions to the Open Burning Rule would allow more open burning to occur throughout the entire year and would no longer restrict the categories of minor source that could burn from September through February. We believe this is a relaxation of the existing open burning rules in the Federally approved State Implementation Plan (SIP). We do not believe we can approve the provisions that allow more open burning unless the State submits an analysis showing that the relaxation will not interfere with attainment and reasonable further progress, or any other applicable requirement of the Clean Air Act (Act). See section 110(1) of the Act.

RESPONSE: The board believes that allowing open burning to take place during periods when it is currently prohibited does not increase the total amount of burning that takes place. The burning that is going to take place is merely spread throughout the entire year. This reduces emissions during the fall and spring. Allowing minor open burning to occur under favorable conditions during the winter months will not endanger ambient air quality standards since the burning would be allowed only at times and in places where the ventilation is sufficient to protect ambient standards.

COMMENT NO. 2: In ARM 17.8.605(1)(h) the rule is being revised to allow minor open burning during the entire year. However, ARM 17.8.606 places some restrictions on minor open burning from September through February. If the State can make the demonstration mentioned in Comment No. 1, we believe ARM 17.8.605(1)(h) should be revised to read as follows: "any minor open burning that is not prohibited by ARM 17.8.604 nor restricted by ARM 17.8.606." To the extent that any of the other categories of sources listed in ARM 17.8.605 are also restricted by ARM 17.8.606, ARM 17.8.605 should be revised to indicate that burning throughout the entire year may be limited by ARM 17.8.606.

RESPONSE: ARM 17.8.605(1)(a) through ARM 17.8.605(1)(h) simply state the types of burning that are allowed to be conducted during the entire year. ARM 17.8.606 contains the requirements that a minor open burning source must adhere to prior to burning during the general open burning season (March through August), the ventilation hotline period (September through November), and the winter season (December through February).

The board believes that the language EPA suggested for ARM 17.8.605(1)(h) points out the obvious, that allowing minor open burning to potentially take place during the entire year

does not exempt minor open burning sources from complying with the requirements contained in ARM 17.8.606. However, the board has amended ARM 17.8.605(1)(h) to read as shown above.

COMMENT NO. 3: ARM 17.8.605 is being revised to allow more source categories to burn during the entire year. If the State can make the demonstration mentioned in Comment No. 1, we believe the definition of BACT, ARM 17.8.601(1)(b) and (c), should also be revised to include all the source categories allowed to burn the entire year. Therefore, BACT would require the source categories allowed to burn the entire year to burn only during the timeframes specified by the Department.

Likewise, the definition of BACT, at 17.8.601(1)(b) and (c), is being revised to incorporate some additional source categories that need to contact the Department before open burning. In addition to the comment mentioned immediately above, we believe the proposed changes to ARM 17.8.601(1)(b) and (c) should be revised. Specifically, we believe "any other minor open burning," being added to ARM 17.8.601(1)(b) and (c), should be revised to just "minor open burning." We believe including "any other minor open burning" implies that ARM 17.8.601(1)(b) and (c) only apply to minor sources. We do not believe ARM 17.8.601(1)(b) and (c) apply just to minor sources; we believe ARM 17.8.601(1)(b) and (c) are included to address those source categories that are allowed to burn the entire year. We believe adding "any other" with "minor open burning" relaxes the existing Federally-approved SIP definition of BACT. See Comment No. 1 regarding SIP relaxations.

RESPONSE: The board has amended ARM 17.8.601(1)(b) and (c) as shown above.

However, the board does not believe that emergency open burning should be included in ARM 17.8.601(1)(b) or (c). Emergency open burning is exempt from BACT, because, to be considered emergency open burning, the substance to be burned must pose an immediate threat to public health and safety or to plant or animal life. The board also does not believe that open burning to train firefighters should be included in ARM 17.8.601(1)(b) or (c). Open burning to train firefighters is exempt from BACT because of the importance that is placed on firefighter training to enable fire departments to properly protect and/or rescue the public in an emergency situation.

COMMENT NO. 4: The definition of "open burning," ARM 17.8.601(7), is being revised to exclude from the open burning rule requirements the "combustion of ordnance." We are concerned that the open burning regulations do not define "ordnance" nor put any limitations on the size or type of ordnance that is excluded from the open burning requirements. Webster's Ninth New Collegiate Dictionary, 1986, defines ordnance as "military supplies including weapons, ammunition, combat vehicles, and maintenance tools and equipment." We believe excluding the combustion of ordnance from the open

burning regulations is a SIP relaxation. See Comment No. 1. Additionally, excluding the combustion of ordnance from the open burning regulations may imply that it is okay to open burn ordnance. However, when ordnance is discarded it may be subject to hazardous waste permitting requirements.

RESPONSE: The board has amended ARM 17.8.601(7) as shown above.

The board believes that changing the term "combustion of ordnance" to "detonation of unexploded ordnance" addresses EPA's concerns regarding ARM 17.8.601(7) and that further definitions or limitations are not required. In addition, the board believes that the detonation of unexploded ordnance was never considered open burning, because unexploded ordnance may pose an imminent threat to public safety and health. The intent of the proposed amendment to ARM 17.8.601(7) is to clarify that the detonation of unexploded ordnance is not considered open burning.

COMMENT NO. 5: Finally, the revised language added to ARM 17.8.604(1)(a), i.e., "or unless approval is granted by the department on a case-by-case basis," is a department discretion provision. A department discretion provision allows the Department to revise the SIP without completing a formal SIP revision. We do not believe we can approve department discretion provisions because they are inconsistent with section 110(i) of the Act.

RESPONSE: The board does not believe that department approval, on a case-by-case basis of open burning of waste that has been moved from the premises where it was generated, would constitute a SIP revision. Other provisions of the SIP allow the department to make case-by-case determinations. Further, moving waste from the premises where it was generated prior to open burning may be appropriate, on a particular case, to minimize air quality impacts.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, December 16, 2002.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment)	NOTICE OF AMENDMENT
of 17.24.101, 17.24.102,)	
17.24.103, 17.24.104,)	
17.24.106, 17.24.115,)	(METAL MINE RECLAMATION)
17.24.116, 17.24.117,)	
17.24.118, 17.24.119,)	
17.24.140, 17.24.146,)	
17.24.167, and 17.24.184,)	
pertaining to the Metal Mine)	
Reclamation Act)	

TO: All Concerned Persons

1. On August 15, 2002, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rules at page 2059, 2002 Montana Administrative Register, issue number 15.

2. The Board has amended ARM 17.24.101, 17.24.103, 17.24.104, 17.24.106, 17.24.119, 17.24.146, 17.24.167 and 17.24.184 exactly as proposed. The Board has amended ARM 17.24.102, 17.24.115, 17.24.116, 17.24.117, 17.24.118 and 17.24.140 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.24.102 DEFINITIONS (1) through (12) remain as proposed.

(13) "Reclamation" means the return of lands disturbed by mining or mining-related activities to an approved postmining land use which has stability and utility comparable to that of the premining landscape except for rock faces and open pits which may not be feasible to reclaim to this standard. Those rock faces and open pits must be reclaimed in accordance with 82-4-336, MCA. The term "reclamation" does not mean restoring the landscape to its premining condition. Reclamation, where appropriate, may include, but is not limited to:

- (a) neutralizing cyanide or other processing chemicals;
- (b) closure activities for ore heaps, waste rock dumps, and tailing impoundments;
- (c) closure activities for surface openings;
- (d) grading, soiling and revegetating disturbed lands;
- (e) removal of buildings and other structures that have no utility in regard to the approved post-mine land use;
- (f) other steps necessary to assure long-term compliance with Title 75, chapters 2 and 5, MCA; and
- (g) other steps necessary to protect public health and safety at closure.

(14) through (17) remain as proposed.

17.24.115 OPERATING PERMITS: RECLAMATION PLANS

(1) through (1)(m) remain as proposed.

(n) The plan must provide for post mine environmental monitoring programs and contingency plans for the post reclamation permit area. The monitoring programs and contingency plans must be related in scope and duration to the risk to public safety, water quality and adjacent lands they were designed to address.

17.24.116 OPERATING PERMIT: APPLICATION REQUIREMENTS

(1) and (2) remain as proposed.

(3) In addition to the information required by 82-4-335(4), MCA, an application for an operating permit must describe the following:

(a) through (t) remain as proposed.

(u) the protective measures for off-site designed to avoid foreseeable situations of unnecessary damage to flora and fauna in or adjacent to the area.

(4) and (5) remain as proposed.

17.24.117 OPERATING PERMIT CONDITIONS (1) through

(1)(a)(iv) remain as proposed.

(v) the most recent reclamation bond calculations plans or assumptions used in calculating bond amounts that have been posted by the permittee.

(b) and (c) remain as proposed.

17.24.118 OPERATING PERMIT ANNUAL REPORT (1) through (12) remain as proposed.

(13) The department shall, by certified mail, notify a permittee, who fails to file an annual report and fee as required by this rule, that the permit will be suspended if the report and fee are not filed within 30 days of receipt of the notice, ~~unless a 30-day extension is granted by the department.~~

(14) If a permittee fails to file an annual report and fee within 30 days of receipt of a notice ~~or within a 30-day extension granted by the department,~~ the department shall suspend the permit.

17.24.140 BONDING: DETERMINATION OF BOND AMOUNT

(1) through (3) remain as proposed.

(4) Unless the provisions of the bond provide otherwise, The the line items in the bond calculations are estimates only and are not limits on spending of any part of the bond to complete any particular task subsequent to forfeiture of the bond or settlement in the context of bond forfeiture proceedings.

(5) and (6) remain as proposed.

3. The following comments were received, and appear with the Board's responses:

17.24.102 Definitions

COMMENT NO. 1: A number of commentors strongly opposed the proposed amendment to the definition of "collateral bond" set

forth in ARM 17.24.102(5), indicating that the current definitional language is sufficient. The commentors indicated that the proposed amendment mimics the existing statutory language in 82-4-338, MCA, and does not clarify what type of collateral bond may be acceptable to DEQ.

RESPONSE: The current definition of "collateral bond" set forth in ARM 17.24.102(5) limits the types of instruments that the Department may accept to cash bonds, negotiable bonds, certificates of deposit and irrevocable letters of credit. This limitation is not consistent with 82-4-338, MCA, which allows the Department to accept a "cash deposit, an assignment of a certificate of deposit, an irrevocable letter of credit, or other surety acceptable to the department" as an alternative to a surety bond. Thus, the amendment to ARM 17.24.102(5) makes the definition of "collateral bond" consistent with 82-4-338, MCA.

Surety bonds recently have become difficult to obtain, requiring operators to submit bond secured in some other fashion. The Board believes that the Department should have the discretion to accept other types of bonds. The only other type of bond that has been accepted by the Department to date that is not specifically listed in 82-4-338, MCA, or ARM 17.24.102(5) has been a real property bond.

COMMENT NO. 2: The proposed amendment to the definition of "plan of operations" set forth in ARM 17.24.102(11) states that it includes the reclamation plan. However, the statutory references treat the reclamation plan separately from the plan of operations.

RESPONSE: This comment is directed at a provision currently contained in ARM 17.24.102(11). The current language defines "plan of operation" to include the reclamation plan. The proposed rule amendment provides that a plan of operation also includes operating, monitoring and contingency plans. The change suggested by the commentor is outside the scope of this rulemaking proceeding.

COMMENT NO. 3: Defining reclamation in ARM 17.24.102(13) to include "removal of buildings and other structures" may be interpreted in such a manner that the release of reclamation bond is delayed.

RESPONSE: Whether or not the removal of buildings and other facilities is a required component of reclamation is dependent on the approved post-mine land use. The post-mine land use is determined during the permit application process and may be subsequently changed by amendment. Release of the reclamation bond may be delayed if an operator fails to remove buildings, or other facilities associated with its mining operation, that are not consistent with the approved post-mine land use. For example, the failure to remove a mill building, where the approved post-mine land use is wildlife habitat, may result in a delay of bond release, while failure to remove a mill building, that has subsequent use to store farm equipment,

would not result in a delay of bond release if the approved post-mine land use was cropland.

The Board has added additional language that ties reclamation of buildings and other structures with the approved post-mine land use. The nexus between building and other structure removal and the approved post-mine land use is further addressed in the Board's amendment to ARM 17.24.115(1)(m). See Response to Comment No. 6.

17.24.115 Operating Permit: Reclamation Plans

COMMENT NO. 4: Striking the introductory phrase "to the extent reasonable and practicable" leaves ARM 17.24.115(1)(c) without any recognition of this important statutory mandate. Because the proposed amendment eliminates the implication that only two vegetative efforts are required, this deletion of the introductory phrase is not necessary to implement the reclamation requirement that a self-generating vegetative cover be established.

RESPONSE: Section 82-4-336(8), MCA, requires a reclamation plan to provide for the establishment of vegetative cover if appropriate for the approved post-mine land use. This statutory mandate is carried forward in the amendment to ARM 17.24.115(1)(c), by requiring a reclamation plan to address establishment of vegetative cover commensurate with the post-mine land use. Adding the phrase "to the extent reasonable and practicable" would weaken and possibly contravene the requirement that an operator establish revegetation, if any, sufficient to achieve the post-mine land use.

COMMENT NO. 5: Section 82-4-336, MCA, states that a reclamation plan should require vegetative cover "if appropriate to the future use of the land as specified in the reclamation plan." The statement of reasonable necessity, set forth in the Notice of Public Hearing on Proposed Amendment in regard to the proposed amendment to ARM 17.24.115(1)(c), fails to expressly acknowledge that vegetative cover is required "if appropriate".

RESPONSE: In the statement of reasonable necessity, the Board indicated that the amendment to ARM 17.24.115(1)(c) clarified that a reclamation plan must require the "establishment of vegetative cover and permanent landscaping pursuant to 82-4-336(8)" By referring to 82-4-336(8), MCA, the Board intended to incorporate the statutory requirement that vegetative cover be addressed in a reclamation plan only if revegetation is appropriate for the approved post-mine land use. The Board agrees with the commentor's overriding concern that revegetation, including whether a site is to be revegetated at all, is dependent upon the approved post-mine land use.

COMMENT NO. 6: The proposed amendment to ARM 17.24.115(1)(m), regarding the reclamation of buildings and other structures, should clearly state that, like other reclamation activities, building removal should be required as

appropriate to post-mine use. As proposed, the regulation is ambiguous.

RESPONSE: The first sentence of ARM 17.24.115(1)(m) states that "all facilities . . . must be reclaimed for the approved post-mine land use" and the second sentence states that a reclamation plan must require the "removal of buildings and other structures . . . consistent with the post-mine land use." Additionally, in response to Comment No. 3, the Board has added language in its amendment of ARM 17.24.102(13), tying the reclamation of buildings and other structures with the approved post-mine land use. The Board believes that these provisions clearly state that the removal of buildings and other structures during reclamation is dependent upon the approved post-mine land use.

COMMENT NO. 7: The proposed amendment to ARM 17.24.115(1)(n) includes post-mine environmental monitoring and contingency plans as part of the reclamation plan. The statement of reasonable necessity set forth in the Notice of Public Hearing on Proposed Amendment states that ARM 17.24.115(1)(n) is being added to implement 82-4-336(10), MCA. However, the reference statute is a general provision that does not authorize a regulation that is open-ended and not confined as to scope or duration.

RESPONSE: Section 82-4-336(10), MCA, requires "sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands." The scope and duration of the post-mine monitoring and contingency plans must coincide with the scope and duration of the risk to public safety, water quality, and adjacent lands.

The Board agrees that the provision should be qualified and has added additional language tying the scope and duration of the monitoring and contingency plans to the risk to public safety, water quality, and adjacent lands that the plans are designed to address.

COMMENT NO. 8: There appears to be a definitional problem with the proposed amendment to ARM 17.24.115(1)(n) regarding monitoring and contingency plans. First, the definition of operating plan states that it means "the reclamation plan . . . plus the approved operating, monitoring and contingency plans required in an application for an operating permit." This amendment to (n) adds monitoring and contingency plans to the reclamation plan, which by definition is part of the operating plan. Are the monitoring and contingency plans required in the application the same or different than those required in the reclamation plan?

RESPONSE: An application consists of operating and reclamation plans as required by 82-4-335 and 82-4-336, MCA. Monitoring and contingency plans may be appropriate during operations and/or during and following reclamation and, thus, may be included in both the operating plan and the reclamation plan. The appropriateness of monitoring and contingency plans is site specific and determined during the permitting process.

COMMENT NO. 9: We do not necessarily oppose the addition of ARM 17.24.115(1)(n) but are curious for what type of contingency DEQ expects the operator to plan. This language could mean anything and should probably be more specific.

RESPONSE: The contingency, if any, would be operation specific and would be identified during the application review process. For example, a mine handling process water through a pipe system may be required to develop a spill contingency.

17.24.116 Operating Permit: Application Requirements

COMMENT NO. 10: The proposed amendment to ARM 17.24.116(3)(u) requiring protective measures for off-site flora and fauna should have some relationship to the mine itself.

RESPONSE: The Board has modified the amendment to ARM 17.24.116(3)(u) to require protective measures for only the off-site flora and fauna that may foreseeably be damaged by the operation.

COMMENT NO. 11: The proposed amendment to ARM 17.24.117(1)(a)(i) is unnecessary in light of the proposed amendment to the definition of "plan of operations" set forth in ARM 17.24.102(11). The latter rule provision already includes a reference to the approved operating, reclamation, monitoring, and contingency plans. Thus, the proposed amendment to ARM 17.24.117(1)(a)(i) is superfluous and redundant.

RESPONSE: This section is intended to be comprehensive in informing a permittee of the conditions accompanying the issuance of the permit.

17.24.117 Operating Permit Conditions

COMMENT NO. 12: Reclamation bond calculations may be entirely unilateral, involving only the agency. This proposed rule would allow the Department to unilaterally amend the permit with no participation by the permittee. This rule accordingly conflicts with 82-4-337(3), MCA, which provides for amendment of the permit by the Department in only three situations after timely notice and opportunity for hearing.

RESPONSE: The commentor correctly states that the provisions of a permit are properly amended only under the provisions of 82-4-337(3), MCA. The amendment to ARM 17.24.117 is not meant to circumvent that statutory provision. Rather, the purpose of the amendment is to make a condition of the permit plans or assumptions used by the Department in calculating a bond to which the permittee has agreed. The Board has modified the amendment to ARM 17.24.117 to make a condition of the permit only the plans and assumptions used in calculating a bond that has been submitted by the permittee.

17.24.118 Operating Permit Annual Report

COMMENT NO. 13: Companies should not be allowed extra time to file the annual report. Annual reports provide valuable information to the public and they should be filed in a timely manner. There is no statutory authority for any additional extension.

RESPONSE: The Board agrees with the comment and has deleted the proposed extension that would have given an operator thirty additional days to file its annual report.

17.24.140 Bonding: Determination of Bond Amount

COMMENT NO. 14: The unavoidable implication of the proposed amendment to ARM 17.24.140(4), is that there can and will be no release of bond upon completion of discrete aspects of reclamation. This proposed amendment creates an uncertainty with respect to incremental bond release associated with completed reclamation.

RESPONSE: ARM 17.24.140(4) addresses spending of the bond by the Department, following bond forfeiture, and does not address the issue of bond release when reclamation or discrete portions of reclamation have been completed. The Board has added language to the amendment to clarify that its provisions are only applicable subsequent to a bond forfeiture.

COMMENT NO. 15: To the extent that ARM 17.24.140(4) purports to apply to existing bonds, it may violate the constitutional prohibition of statutes impairing the obligations of existing contracts.

RESPONSE: In determining whether a state law constitutes an unconstitutional impairment of a contract, the Montana Supreme Court applies a three-tiered analysis. The threshold inquiry is whether the state law operates as a substantial impairment of the contractual relationship, focusing on the reasonable expectations of the parties under the contract. If the answer to the threshold inquiry is no, no further inquiry is required. If the state law constitutes a substantial impairment, two criteria must be satisfied in order for the state law to be upheld. The State, in justification, must have a significant and legitimate public purpose behind the state law. Once a legitimate public purpose has been identified, the adjustment of the rights of the contracting parties must be based upon reasonable conditions and be of a character appropriate to the public purpose behind the state law.

To satisfy bonding requirements, an operator must submit to the Department a bonding instrument in an amount determined by the Department to cover the cost of reclamation. Bonding instruments (whether a cash bond, surety bond, certificate of deposit assignment or letter of credit) contractually obligate the operator, or bonding entity on behalf of the operator, to pay a sum not to exceed the bond amount determined by the Department in the event that the conditions for bond forfeiture are met. Unless provisions have been negotiated to the contrary and as a general rule, bonding instruments do not reference or incorporate the line-item estimates used in the bond

calculation. Thus, the operator or the bonding entity does not have a contractual expectation that a line-item estimate in the bond calculation for a particular reclamation activity will serve as a limit on the amount of bond proceeds that the Department may spend on that reclamation activity. Thus, the proposed amendment is not a substantial impairment of the contractual relationship and does not violate the constitutional prohibition on the impairment of contracts.

The amendment to ARM 17.24.140(4) has been modified to take into consideration the exception to the general rule by adding the phrase "unless the provisions of the bond otherwise."

17.24.146 Bonding: Letters of Credit

COMMENT NO. 16: This language may be ambiguous for a surety and may deny an operator the ability to retain a letter of credit. The word "provision" could be changed to "provisions" to better clarify that the noncompliance resulting in forfeiture would be severe.

RESPONSE: The proposed amendment allows a letter of credit to be payable to the Department only under those circumstances that the Metal Mine Reclamation Act provides for forfeiture of the bond. These circumstances are set forth in 82-4-338(8)(a), 82-4-241(4), and 82-4-362(2), MCA. Thus, the proposed amendment addresses the commentor's concern that the forfeiture be allowed only when a "noncompliance" is severe by allowing collection on the letter of credit only under those circumstances that the Montana Legislature has deemed sufficiently severe so as to enact a statutory basis for bond revocation. The Department proposed inclusion of this provision in two letters of credit that were recently executed and did not receive any opposition from the issuing bank.

HB521 Review

COMMENT NO. 17: A House Bill 521 (HB521) review is not required for rules implemented under the Metal Mine Reclamation Act. A HB521 review is required, however, for rules implemented under Title 75, chapters 2 and 5 (Air Quality Act and Water Quality Act, respectively). Because ARM 17.24.102(13), 17.24.104, 17.24.106, 17.24.115 and 17.24.140 require compliance with Title 75, chapters 2 and 5, a HB521 review is required for these rule amendments.

RESPONSE: HB521 was enacted by the 1995 Legislature. See Chapter 471, Laws of 1995. A HB521 review requires the Department to make certain written findings if a proposed rule contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law. As acknowledged by the commentor, HB521 is not applicable to the Metal Mine Reclamation Act. While these rule amendments require compliance with Air and Water Quality Act standards and requirements, the Air and Water Quality Act standards and requirements have already undergone a HB521 review when they were implemented. Therefore, no HB521 analysis is necessary.

Furthermore, operators are bound to comply with the Air and Water Quality Acts.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

John F. North
JOHN F. NORTH, Rule Reviewer

Certified to the Secretary of State, December 16, 2002.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment)
of ARM 17.74.401 pertaining to)
fees for asbestos project)
permits)

NOTICE OF AMENDMENT

(ASBESTOS)

TO: All Concerned Persons

1. On November 14, 2002, the Department of Environmental Quality published a notice of public hearing on the proposed amendment of the above-stated rule at page 3123, 2002 Montana Administrative Register, issue number 21.

2. The Department has amended the rule as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.74.401 FEES FOR PERMITS (1) Applicants for permits must pay a permit fee to the department upon application for a permit as follows:

- (a) remains as proposed.
- (b) annual permit \$145 \$850
- (c) remains as proposed.
- (d) amendments to annual permit \$145 \$300
- (2) remains as proposed.

3. The following comments were received and appear with the Department's responses:

Comment 1: A commentor stated his opposition to the annual permit fee reduction because he believes that it costs the Department more than \$145 a year to administer an annual permit and to inspect the permit-holder's facility at least once a year. He believes that the Department should continue to charge the current \$1,500 annual permit fee with the \$500 additional fee if an outside contractor does the work rather than the permit holder.

The commentor expressed concerns that facilities will apply for an inexpensive annual permit rather than paying higher permit fees for each asbestos project they conduct, and he believes that asbestos contractors will suggest this to their clients. The commentor does not believe that current annual permit-holders object to the present \$1,500 annual fee.

Response 1: The Department agrees that the \$145 proposed annual permit fee is inadequate to cover the costs of permit administration, but does not agree that the Department should continue to charge the current \$1,500 fee. The Department has changed the amount of the proposed fee to \$850.

Pursuant to 75-2-503(1)(k)(iii), MCA, fees for project permits, including annual facility permits, must be commensurate with costs. The Department has established procedures to track

the costs of issuing and administering annual permits. The Department has conducted additional research since the publication of the initial MAR notice, and has determined that an \$850 annual permit fee would be commensurate with the costs of issuing and administering the annual permit, including one annual inspection of the permit-holder's facility. A fee of \$300 would be commensurate with the costs of amending an annual permit. The Department will continue to track program costs associated with annual permits and will adjust annual permit fees as necessary to ensure that they are commensurate with costs.

The Department has no evidence to indicate that having an outside contractor associated with an annual permit generates additional work sufficient to charge an additional fee for a permit holder who hires an outside contractor.

The Department does not believe that a significant number of facilities will qualify for the less expensive annual permits rather than permits for specific asbestos projects, because annual permits require a facility to have an asbestos health and safety program and to continuously employ accredited asbestos workers. The Department does not believe that there are a significant number of facilities that meet these requirements beyond those that already obtain annual permits. Also, contractors and/or building owners demand fast approval of permit applications. An annual permit takes the Department up to 45 days to process, while the issuance of a project permit requires only 7 to 10 days.

DEPARTMENT OF ENVIRONMENTAL QUALITY

By: Jan P. Sensibaugh
JAN P. SENSIBAUGH, Director

Reviewed by:

David Rusoff
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of NEW RULE I authorizing)
establishing the minimum)
qualifications for commercial)
vehicle inspectors and NEW RULE II)
establishing the requirements)
for a commercial vehicle)
inspector basic certificate)

To: All Concerned Persons

1. On September 12, 2002, the Board of Crime Control published notice of the proposed adoption of new RULE I (ARM 23.14.572) authorizing establishing the minimum qualifications for commercial vehicle inspectors and new RULE II (ARM 23.14.573) establishing the requirements for a commercial vehicle inspector basic certificate at page 2379 of the 2002 Montana Administrative Register, Issue Number 17.

2. On October 2, 2002, a public hearing was held in the auditorium of the Scott Hart Building, 303 North Roberts, Helena, Montana. No comments were received at the hearing or submitted separately in writing or by e-mail.

3. The Department has adopted new RULE I (ARM 23.14.572) with the following change. New matter underlined, stricken matter interlined:

23.14.572 MINIMUM QUALIFICATIONS FOR COMMERCIAL VEHICLE INSPECTORS (1) through (1)(e) remain as proposed.

(f) be a high school graduate or have passed the general education development test and have been issued an equivalency certificate by the superintendent of public ~~pubic~~ instruction or by an appropriate issuing agency of another state or of the federal government;

(g) through (4) remain as proposed.

4. NEW RULE II (ARM 23.14.573) was adopted exactly as proposed.

MONTANA DEPARTMENT OF JUSTICE

By: /s/ JIM OPPEDAHL
JIM OPPEDAHL, Crime Control Division
Department of Justice

/s/ ALI BOVINGDON
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State December 16, 2002.

BEFORE THE BOARD OF NURSING
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment) CORRECTED NOTICE OF
of ARM 8.32.1510, related to) AMENDMENT
nursing)

TO: All Concerned Persons

1. On December 12, 2002, the Department of Labor and Industry published a notice of the amendment, adoption and repeal of a variety of nursing rules at page 3399 of the 2002 Montana Administrative Register, Issue Number 23.

2. The reason for the correction is that the Notice inadvertently omitted ARM 8.32.1510 from the list in paragraph 4 of the rules that were amended exactly as proposed.

BOARD OF NURSING
KIM POWELL, RN, MSN, APRN, Chair

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: December 16, 2002.

BEFORE THE BOARD OF ATHLETICS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 24.117.402,)
24.117.406, 24.117.502,)
24.117.905, and 24.117.906,)
relating to the board of)
athletics)

TO: All Concerned Persons

1. On October 31, 2002, the Department of Labor and Industry published notice of the proposed amendment of the above-stated rules at page 2973 of the 2002 Montana Administrative Register, Issue Number 20.

2. On November 22, 2002, a public hearing on the proposed amendment of the above-stated rules was conducted in Helena. Public comments were made at the hearing in response to the proposed amendment of ARM 24.117.502. No written comments were received.

3. The Board of Athletics (Board) has thoroughly considered all of the comments made regarding proposed amendments to ARM 24.117.502. A summary of the comments received and the Board's responses are as follows:

Comment: Mr. Bob LeCoure, owner of Club Boxing, Inc., commented in opposition to the proposed amendment of ARM 24.117.502. Mr. LeCoure expressed concern that having an ambulance present at each club boxing event is not needed and would force the closure of some club boxing venues. He also stated that the USABF (amateur organization that runs the Olympic-style boxing throughout the United States) only requires an ambulance at their national tournament held once a year. He stated that the USABF is very safety conscious, and that the Board's requirement of an ambulance is too stringent by comparison. Mr. LeCoure provided information to the Board that the response times for ambulance services in his Montana venues is estimated at 15 minutes or less.

Response: The Board acknowledges the comments, and states that the proposed amendment does not require that an ambulance be present at all events. The amendment requires either an ambulance or medical personnel with appropriate resuscitation equipment be present at all events. The Board does not believe that this requirement is an undue financial burden on promoters, because an ambulance is not specifically required. The Board believes the presence of the resuscitation equipment will enable medical personnel to provide immediate and potential life-saving attention in emergency situations. The Board concludes that this amendment is necessary in the interest of public safety.

4. After consideration of the comments, the Board has amended the rules exactly as proposed.

BOARD OF ATHLETICS
GARY LANGLEY, CHAIRMAN

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

Certified to the Secretary of State: December 16, 2002.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the	)	NOTICE OF AMENDMENT,
amendment of ARM 24.174.301,	)	ADOPTION AND REPEAL
24.174.501, 24.174.604,)	
24.174.711, 24.174.1411,)	
and 24.174.2106,)	
pertaining to definitions,)	
foreign graduates, preceptor)	
requirements, technician ratio)	
and pharmacy security)	
requirements, the)	
adoption of new rule II,)	
personnel, new rule III,)	
absence of pharmacist,)	
new rule IV, use of emergency)	
drug kits, new rule V, drug)	
distribution, new rule VI,)	
pharmacist responsibility,)	
new rule VII, sterile products,)	
new rule VIII, return of)	
medication from long term care)	
facilities, and new rule IX,)	
pharmacist meal/rest breaks,)	
and the repeal of)	
ARM 24.174.302, health care)	
facility definition,)	
24.174.810, class I facility,)	
24.174.811, class II facility)	
and 24.174.812, class III)	
facility)	

TO: All Concerned Persons

1. On July 11, 2002, the Board of Pharmacy published a notice of the proposed amendment, adoption and repeal of the above-stated rules at page 1868, 2002 Montana Administrative Register, Issue Number 13.

2. On August 15, 2002, the Board of Pharmacy published a notice of an additional public hearing and extension of the comment period concerning the proposed amendment, adoption and repeal of the above-stated rules at page 2159, 2002 Montana Administrative Register, Issue Number 15.

3. After considering the comments made, the Board has amended the following rules exactly as proposed:

24.174.604 PRECEPTOR REQUIREMENTS

24.174.2106 REGISTERED PHARMACIST CONTINUING EDUCATION - APPROVED PROGRAMS

4. After considering the comments made, the Board has amended the following rules as proposed but with the following changes, added material underlined, deleted material interlined:

24.174.301 DEFINITIONS (1) remains as proposed.

~~(2) "Class IV facility" means a family planning center under the administrative jurisdiction of the maternal and child health services bureau, department of public health and human services, and which has a Class IV facility pharmacy registered and licensed by the board.~~

(3) through (5) remain as proposed, but are re-numbered (2) through (4).

(6) and (7) remain the same, but are re-numbered (5) and (6).

~~(8)~~(7) "Drug order" means a written or electronic order issued by an authorized practitioner, or a verbal order promptly reduced to writing ~~and later signed by an authorized practitioner,~~ for the compounding and dispensing of a drug or device to be administered to patients within the facility.

(9) remain as proposed, but is re-numbered (8).

(10) remains the same, but is re-numbered (9).

(11) and (12) remain as proposed, but are re-numbered (10) and (11).

~~(13)~~(12) "Facility" means an ambulatory surgical facility outpatient center for surgical services, a hospital and/or long term care facility, or a home infusion facility.

(14) and (15) remain as proposed, but are re-numbered (13) and (14).

~~(16)~~(15) "Home infusion facility" means a facility where parenteral solutions are compounded and distributed to outpatients for home infusion pursuant to a valid prescription or drug order.

~~(17)~~(16) "Institutional pharmacy" means that physical portion of an institutional facility where drugs, devices and other material used in the diagnosis and treatment of injury, illness, and disease are dispensed, compounded and distributed to other health care professionals for administration to patients within or outside the facility, and pharmaceutical care is provided; ~~and which is registered with the Montana board of pharmacy.~~

(18) remains the same, but is re-numbered (17).

(19) and (20) remain as proposed, but are re-numbered (18) and (19).

(21) remains the same, but is re-numbered (20).

(22) remains as proposed, but is re-numbered (21).

(23) remains the same, but is re-numbered (22).

(24) and (25) remain as proposed, but are re-numbered (23) and (24).

(26) remains the same, but is re-numbered (25).

(27) remains as proposed, but is re-numbered (26).

AUTH: 37-7-201, MCA

IMP: 37-7-102, 37-7-201, 37-7-301, 37-7-406, MCA

24.174.501 EXAMINATION FOR LICENSURE AS A REGISTERED PHARMACIST (1) and (2) remain the same.

(3) ~~An~~ A successful interview by before the board of pharmacy or its designee, the test of English as a foreign language, test of spoken English and the foreign pharmacy graduate equivalency exam provided by the national association of boards of pharmacy will be required for pharmacy graduates from outside the 50 states, the District of Columbia or Puerto Rico, who seek certification of educational equivalency in order to sit for the North American pharmacist licensure examination. A scaled score of 75 or greater will be the passing score for this examination. A candidate who does not attain this score may retake the examination after a 91 day waiting period.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-302, MCA

24.174.711 RATIO OF PHARMACY TECHNICIANS TO SUPERVISING PHARMACISTS (1) through (7) remain as proposed.

(8) Nothing in this rule shall prevent a pharmacy from terminating a service plan upon written notification to the board.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-307, 37-7-308, 37-7-309, MCA

24.174.1411 SECURITY REQUIREMENTS (1) through (3) remain as proposed.

(4) The registrant shall notify law enforcement officials of any theft or loss of any dangerous drug promptly upon discovery of such theft or loss ~~and forward a copy of that agency's report to the board within 30 days.~~

AUTH: 50-32-103, MCA
IMP: 50-32-106, MCA

5. After consideration of the comments, the Board has decided not to adopt proposed NEW RULE I.

6. After consideration of the comments, the Board has adopted the following rule exactly as proposed:

NEW RULE VIII (ARM 24.174.1141) RETURN OF MEDICATION FROM LONG TERM CARE FACILITIES -- DONATED DRUG PROGRAM

7. After consideration of the comments, the Board has adopted the following new rules as proposed but with the following changes, added material underlined, deleted material interlined:

NEW RULE II (ARM 24.174.1101) PERSONNEL (1) Each institutional pharmacy must be directed by a pharmacist-in-charge who is licensed to engage in the practice of pharmacy

in the state of Montana and who is responsible for the storage, compounding, repackaging, dispensing and distribution of drugs within the facility. Depending upon the needs of the facility, pharmacy services may be provided on a full or part-time basis, with a mechanism for emergency service provided at all times. Contractual providers of pharmacy services shall meet the same requirements as pharmacies located within the institution.

(2) remains as proposed.

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-307, MCA

NEW RULE III (ARM 24.174.1107) ABSENCE OF PHARMACIST IN INSTITUTIONAL SETTINGS (1) During times that an institutional pharmacy does not have a pharmacist in attendance, arrangements must be made in advance by the pharmacist-in-charge for provision of drugs to the medical staff and other authorized personnel by use of night cabinets, floor stock and, in emergency circumstances, by access to the pharmacy. ~~A pharmacist must be available by phone for consultation during all absences.~~ A mechanism for providers and nursing to obtain pharmacy consultation must be available at all times in accordance with ARM 24.174.1101.

(2) through (3)(e) remain as proposed.

(4) A complete verification audit of all orders and activity concerning the night cabinet must be conducted by the pharmacist-in-charge or the designee of that pharmacist within 24 48 hours of the drugs having been removed from the night cabinet.

(5) Whenever any drug is not available from floor stock or night cabinets, and that drug is required to treat the immediate needs of a patient whose health would otherwise be jeopardized, the drug may be obtained from the pharmacy by a supervisory an authorized registered nurse or licensed practical nurse in accordance with established policies and procedures. The responsible nurse shall be designated by the appropriate committee of the institutional facility.

(a) Removal of any drug from the pharmacy by an authorized nurse must be recorded on a suitable form left in the pharmacy showing the following information:

(i) and (ii) remain as proposed.

(iii) the name, strength, ~~and~~ quantity and NDC number of drug removed;

(iv) the date and time the drug was removed; ~~and~~

(v) the signature of the nurse removing the drug; ~~and~~

(vi) documentation of pharmacy review.

~~(b) The form shall be sequestered in the pharmacy with the container from which the drug was removed, and a copy of the original drug order.~~

(6) A copy of the original drug order with the NDC number or other identifying code of the drug(s) provided may be faxed to the pharmacist. A patient profile containing the patient's name, location, allergies, current medication

regimen and relevant laboratory values must be prospectively reviewed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, MCA

NEW RULE IV (ARM 24.174.1114) USE OF EMERGENCY DRUG KITS IN CERTAIN INSTITUTIONAL FACILITIES (1) and (1)(a) remain as proposed.

(b) the supplying pharmacist and the ~~staff physician~~ designated practitioner or appropriate committee of the institutional facility shall jointly determine the identity and quantity of drugs to be included in the kit;

(c) through (2) remain as proposed.

(3) The supplying pharmacist shall be notified of any entry into the kit ~~within 24 hours of its occurrence~~. The supplying pharmacist shall have a mechanism defined in policy to restock and reseal the kit within a reasonable time so as to prevent risk of harm to patients.

(4) and (5) remain as proposed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, MCA

NEW RULE V (ARM 24.174.1111) DRUG DISTRIBUTION AND CONTROL IN AN INSTITUTIONAL FACILITY (1) The pharmacist-in-charge shall establish written policies and procedures for the safe and efficient distribution of drugs and provision of pharmaceutical care, including the mechanism by which prospective drug review will be accomplished and documented. A current copy of such procedures must be on hand for inspection by the board of pharmacy.

(2) and (3) remain the same.

(4) Investigational drugs must be stored in and dispensed from the pharmacy only pursuant to written policies and procedures. Complete information regarding these drugs and their disposition must be maintained in the pharmacy facility. The drug monograph and a signed patient consent form must be obtained and made available in accordance with state and federal guidelines.

(5) A sample drug policy must be established if samples are used.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-307, 37-7-308, MCA

NEW RULE VI (ARM 24.174.1104) INSTITUTIONAL PHARMACIST AND PHARMACIST-IN-CHARGE RESPONSIBILITY (1) through (1)(d) remain as proposed.

(e) a mechanism policy by which ~~changes in a patient's an offer is made to convey the discharge medication regimen are conveyed to that a patient's home pharmacy pharmacies;~~

(f) through (s) remain as proposed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-307, 37-7-308, MCA

NEW RULE VII (ARM 24.174.1121) STERILE PRODUCTS

(1) remains as proposed.

(2) An institutional pharmacy compounding sterile products must have an isolated area restricted to entry by authorized personnel. ~~That area must be~~ designed to avoid unnecessary traffic and airflow disturbances.

(3) An institutional pharmacy compounding sterile products must utilize an appropriate aseptic environmental control device such as a laminar flow biological safety cabinet capable of maintaining Class 100 conditions during normal activity, or have policies and procedures in place limiting the pharmacy's scope of sterile product preparation.

(4) An institution preparing cytotoxic drugs must have a vertical flow Class II biological safety cabinet. Cytotoxic drugs must be prepared in a vertical flow Class II biological safety cabinet. ~~Non-cytotoxic sterile pharmaceuticals must not be compounded in this cabinet.~~

(a) through (8) remain as proposed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, 37-7-307, 37-7-308, MCA

NEW RULE IX (ARM 24.174.411) PHARMACIST MEAL/REST BREAKS (1) remains as proposed.

(2) The time of ~~closure and re-opening~~ the meal/rest break will be conspicuously posted in clear view of patients approaching the prescription area ~~and will be consistently scheduled.~~

(3) through (9) remain as proposed.

(10) New hardcopy prescriptions may be accepted and processed by registered technicians in the pharmacist's absence. These prescriptions may not be dispensed until the pharmacist has performed drug utilization prospective drug review and completed the final check.

(11) and (12) remain as proposed.

AUTH: 37-7-201, MCA
IMP: 37-7-201, MCA

8. After consideration of the comments, the Board has repealed ARM 24.174.302, 24.174.810, 24.174.811, and 24.174.812 as proposed.

9. The following comments were received and appear with the Board's response.

Comment 1: Three commenters stated that ARM 24.174.301(2), defining a Class IV facility, is confusing, and that it appeared to propose licensure of Class IV pharmacies located at family planning clinics. The commenters stated that pursuant to 37-2-104, MCA, family planning clinics that

dispense only factory-prepackaged oral contraceptives may do so without a Class IV Facility license.

Response 1: The Board agrees with the comments and has deleted the proposed amendment. Class IV facility is defined elsewhere, and the present rules for Class IV facilities remain unchanged.

Comment 2: One commenter suggested that as long as the Board is revising the rules, it should be clear what family planning clinics need a Class IV license and which do not.

Response 2: The Board agrees with the comment. The topic of Class IV facilities and regulations pertaining to them will be addressed at a future time.

Comment 3: Two commenters raised the question of whether a Class 100 environment is required outside of a hood in the IV room.

Response 3: The Board concludes that a Class 100 environment is not required. Although a clean room is defined in, it was not the intent of the Board to require a hood to be located only in a technical clean room. The Board recommends that hood placement be carefully considered however, and that hoods be placed so as to avoid unnecessary traffic and airflow disturbances.

Comment 4: One commenter suggested that the definition of drug order in ARM 24.174.301(8) should be expanded to include electronic transmission, which is a future standard of practice.

Response 4: The Board agrees and has amended the definition accordingly.

Comment 5: Two commenters stated that the requirement of ARM 24.174.301(8), to have a verbal order signed by an authorized practitioner at a later date, should be deleted in order to avoid confusion between an inpatient drug order and an outpatient prescription.

Response 5: The Board agrees and the requirement has been deleted. The definition of drug order is intended to address patients within a facility, not outpatients in an ambulatory setting.

Comment 6: One comment was received suggesting that ARM 24.174.301(13) needed to be clarified by substituting the correct term of "outpatient center for surgical services" for the term "ambulatory surgical facility".

Response 6: The Board agrees and has amended the definition accordingly.

Comment 7: One comment suggested that the word "care" be added to clarify the meaning of "long term facility" in ARM 24.174.301(13).

Response 7: The Board agrees and has amended the definition accordingly.

Comment 8: One commenter suggested that ARM 24.174.301(14) should define floor stock as containing both prescription and non-prescription drugs. The commenter stated that floor stock is comprised of both.

Response 8: While over-the-counter drugs do not require a prescription by definition, their use within an institution requires the order of an authorized practitioner. No medication in an institutional setting can be given without a valid order. The Board concludes that the proposed definition is adequate.

Comment 9: One comment suggested that ARM 24.174.301(16) should be clarified by the addition of the words "for home infusion", citing that in some cases outpatients receive infusions mixed within the facility while maintaining outpatient status.

Response 9: The Board agrees and has amended the definition accordingly.

Comment 10: Two commenters stated that ARM 24.174.301(17) defining institutional pharmacy incorrectly inferred that federal pharmacies are subject to state licensure.

Response 10: The Board agrees and has amended the definition accordingly.

Comment 11: One comment asked whether the definition of "institutional pharmacy" in ARM 24.174.301(17) includes family planning clinics under contract with DPHHS.

Response 11: No, it does not. It is not the intent of the Board to include family planning clinics within this rule. The rules related to family planning clinics will be examined for clarification in the near future, as noted in Response 2 above.

Comment 12: One commenter stated that tests of written and spoken English should not be required for graduates from other English-speaking countries.

Response 12: The Board notes that this requirement is in line with the policies of the National Association of Boards of Pharmacy (NABP). Varying from NABP requirements would put Montana at risk of being denied reciprocal licensure status with other states. The Board also notes that NABP has recently recognized graduates of accredited Canadian colleges of

pharmacy. Those graduates will soon be able to sit directly for the NAPLEX licensing exam in Montana and other states without going through the Foreign Pharmacy Graduate Equivalency Exam, the test of English as a foreign language, and the test of spoken English.

Comment 13: One commenter questioned what are "appropriate" English language skills? The commenter stated "I have spoken to many who their second language is English. It is very hard to understand them & some barriers always exist. How will they be able to fulfill the counseling requirement when the patient is unable to understand the information given & unable to convey what information they don't understand?"

Response 13: The Board agrees with the commenter that the ability to speak, write and understand English is a critical component of pharmacy practice, and that lack of a pharmacist's ability to speak and understand English could place patients at risk due to ineffective counseling. The board has therefore clarified ARM 24.174.501(3) by requiring a successful interview before the board of pharmacy.

Comment 14: Two comments were received opposing the present 1:1 ratio, stating that a 1:1 ratio was unnecessarily restrictive and did not allow the provision of good pharmaceutical care.

Response 14: The Board did not propose any changes to ARM 24.174.711(1) through (4), and thus the Board believes it is inappropriate to make changes to a part of the rule that has not been properly noticed for public comment. The Board states that the purpose of additions (5) and (6) above is to facilitate tech ratio variance requests, enabling ratios of greater than 1:1 on a site-specific basis. The Board believes that the decision to increase the tech-to-pharmacist ratio in a specific location must be based on clinical advantages to the patient through the facilitation of good pharmacy practice. To that end, the Board has worked with representatives of the Montana Pharmacists Association and surveyed other states to obtain language to aid practitioners in making their ratio variance requests, and to aid the Board in accepting or rejecting those requests. A white paper has recently been approved by the Board that will further facilitate the processing of tech ratio variance requests.

Comment 15: One commenter proposed restricting the number of prescriptions filled per hour by each pharmacist to prevent pharmacist fatigue and protect patient safety.

Response 15: This topic was not included in the proposed rule change wording, and therefore the Board concludes it would be improper to address at this time. The Board notes that while the concept may be good, many states have found such requirements to be difficult to enforce. In addition, the

Board notes that the maximum rate at which individual pharmacists accurately fill prescriptions is highly variable.

Comment 16: Three commenters stated that pharmacists are fully capable of determining the number of technicians they can safely supervise, and therefore no mandatory maximum ratio should be necessary.

Response 16: The Board agrees with the comment, but notes that the final decision on ratio is often out of the pharmacist's hands, falling instead into the hands of the institution or corporation for whom the pharmacist practices. The Board states that in order to protect public health, a general technician ratio must be based on the characteristics of average practice settings, with the goal of facilitation of good pharmacy practice. The Board notes that a ratio variance request process is available on a case-by-case basis.

Comment 17: One comment suggested that clarifying in ARM 24.174.711 the mechanism by which approved technician utilization plans could be cancelled would be helpful as the subject is not adequately addressed.

Response 17: The Board agrees and has amended the rule accordingly.

Comment 18: Two commenters sought clarification whether ARM 24.174.1411 would make it necessary for a pharmacist to notify the police department, the Board of Pharmacy and the DEA "every time we're off by one on the controlled substance count."

Response 18: The Board notes that requirement of reporting the loss of controlled substances to the Board of Pharmacy and the DEA already exist in ARM 24.174.1411. The proposed requirement of ARM 24.174.1411(4) to report loss of controlled substances to law enforcement as well is in addition to those requirements. No threshold defining the minimum amount of loss for reporting is provided by statute, Board rule, or DEA regulation. However, the Board suggests that practitioners ought to err on the side of caution.

Comment 19: One commenter noted that it may not always be possible to obtain a police report, causing compliance with the requirement to be difficult.

Response 19: The Board agrees, and has amended the rule to delete the requirement to forward a copy of the police report to the Board within 30 days of the filing of the report.

Comment 20: Four commenters stated that NEW RULE I requirement of dual licensure for institutional pharmacies providing outpatient services would increase costs while not

providing for a substantial increase in public health and safety.

Response 20: The Board has concluded that the comments are well taken. The Board is not adopting NEW RULE I.

Comment 21: Eleven commenters stated that NEW RULE II would require 24-hour pharmacist coverage, which would be difficult and prohibitively expensive for many rural hospitals. The commenters expressed concern that NEW RULE II would require rural hospitals to contract with a pharmacy that is open or is willing to be available 24 hours per day.

Response 21: The Board does not intend to cause a hardship upon rural hospitals. However the Board believes that emergency pharmacy service is the existing minimum standard of care. Emergency pharmacy service is presently required for Class I and Class II hospitals in the State of Montana. NEW RULE II has been amended by the addition of the words "a mechanism for" to further clarify that the rule is intended to assure that emergency services are available at all times as described in the policies and procedures adopted by a hospital, not that the pharmacist must personally cover 24 hours per day. The Board respectfully suggests that institutions without 24 hour pharmacy service address this situation, as most institutions already have, through the use of night cabinets and emergency room stock. The Board believes that only on rare occasions, when a patient's medical circumstances made it necessary would the institution's pharmacist or a pharmacist in another town need to be contacted for clinical advice.

Comment 22: One commenter sought clarification of the term "available by phone", asking if phone availability needed to be immediate.

Response 22: The Board acknowledges that immediate availability might not always be necessary or possible, and states that pharmacy consultation should be available within a reasonable period of time.

Comment 23: One commenter suggested that NEW RULE III should be modified to clearly state that the pharmacist available does not have to live in the same town or be immediately available.

Response 23: The Board has modified NEW RULE III(1) by the addition of the words "A mechanism for providers and nursing to obtain pharmacy consultation must be available at all times..." to further clarify that NEW RULE III is intended to assure that emergency services are available at all times as described in the policies and procedures adopted by each institution, not that the pharmacist must personally cover 24 hours per day.

Comment 24: One commenter stated that the Board is usurping medical staff's discretion to organize and deliver health care.

Response 24: The Board does not intend to usurp medical staff discretion. However, the Board is required by 37-7-102, MCA, to regulate the practice of pharmacy and protect public health and safety. The Board concludes that this rule constitutes a reasonable regulation of the practice of pharmacy and that it is necessary to protect the public health and safety.

Comment 25: Ten commenters stated that NEW RULE III(4), requiring that a verification audit be conducted within 24 hours of removing drugs from the night cabinet, would cause difficulty and additional expense for institutions with no weekend pharmacy service.

Response 25: The Board does not intend to cause hardship upon institutions without weekend pharmacy service. However, the Board concludes that the risk of patient harm increases with each day that a dosing or medication error is not caught and corrected. The Board has compromised by changing the 24-hour period to a 48-hour period in which to perform a verification audit. The Board believes that a time lapse of more than 48 hours could potentially jeopardize patient health and safety. The board points out that electronic mechanisms are available and can be used for verification audits if needed. Mention of this option was retained for clarity.

Comment 26: Four commenters stated that final HIPAA (Health Insurance Portability and Accountability Act) requirements will have to be considered before the faxing of orders is undertaken.

Response 26: The board agrees that final HIPAA requirements must be considered and complied with when faxing of orders is contemplated.

Comment 27: Two comments on NEW RULE III(5) stated that the nurse accessing the pharmacy should not have to be limited to nurses in a supervisory role, as supervisors are often busy with emergencies.

Response 27: The Board agrees with the comment and has amended the rule accordingly.

Comment 28: Two commenters suggested that a licensed practical nurse could be used in the context of NEW RULE III(5) rather than a registered nurse.

Response 28: The Board agrees with the comment and has amended the rule accordingly.

Comment 29: One commenter suggested that NEW RULE III(5)(a)

should be clarified to specify that the recording form used by an authorized nurse when removing drugs from the pharmacy be left in the pharmacy to avoid confusion.

Response 29: The Board agrees with the comment and has amended the rule accordingly.

Comment 30: Two commenters suggested that the term "NDC number" should be added to NEW RULE III(5)(a)(iii) to facilitate drug identification, which would be useful to verify drug identity even if the pharmacist was in a neighboring town.

Response 30: The Board agrees with the comment and has amended the rule accordingly.

Comment 31: Three comments regarding NEW RULE III(5)(b) stated that requiring the form to be sequestered in the pharmacy with the container from which the drug was removed and a copy of the original drug order could possibly increase expense and is impractical. A copy of the original drug order for purposes of verification can be found in the patient's chart.

Response 31: The Board agrees with the comment and has amended the rule accordingly by deleting subsection (5)(b). The Board added "documentation of pharmacy review" in NEW RULE III(5)(a)(vi) to replace the requirement for pharmacy review of orders deleted in (5)(b).

Comment 32: Seven commenters stated that the requirement for prospective drug review in NEW RULE III(6) was an impractical requirement, that the pharmacist at home does not have the patient profiles necessary to make good clinical decisions, and that a requirement for prospective review would be contrary to providing appropriate emergency service in a timely manner.

Response 32: The Board agrees with the comment and has amended the rule accordingly.

Comment 33: Two commenters questioned whether the "designee" in NEW RULE III(4) must be a registered pharmacist.

Response 33: The Board states that one of the most important purposes of a verification audit is to determine the safety and appropriateness of a medication order for a specific patient and to verify that no errors have been made. Policies and procedures can designate certified pharmacy technicians to check and replace medications used under the supervision of a pharmacist. However the Board concludes that a registered pharmacist must be the one to review and evaluate the medication order for safety and appropriateness.

Comment 34: One commenter asked if automated dispensing machines should be treated the same as night cabinets.

Response 34: Automated dispensing machines are not presently addressed and regulations to clarify their use will be considered in the near future.

Comment 35: One commenter suggested that the Board may need to establish some rules for what items need to be monitored (reports, high risk drugs, mixing information, discrepancies, narcotics, etc.) with regard to automated dispensing machines.

Response 35: The Board states that the comment is well taken. The Board will consider the topic in the near future.

Comment 36: Three commenters stated that the requirement to notify the pharmacist of any entry into an emergency kit within 24 hours may not always be necessary and that emergency kits are often stocked with multiple doses of a drug within an institution. Unnecessary requirements could cause difficulty and unnecessary expense.

Response 36: The Board has concluded that the comments are well taken, and has changed NEW RULE IV(3) to require a policy delineating how restocking and resealing will be accomplished within a reasonable period of time.

Comment 37: The Montana Nurses' Association suggested that the words "staff physician" in NEW RULE IV(1)(b) should be changed to "designated practitioner" to lend flexibility and address a wider range of practice situations.

Response 37: The Board agrees with the comment and has amended the rule accordingly.

Comment 38: One commenter suggested that the title of NEW RULE V be clarified by adding "in an institutional facility" to avoid confusion with community pharmacies.

Response 38: The Board agrees with the comment and has amended the rule accordingly.

Comment 39: Seven commenters stated that the requirement for prospective drug review in NEW RULE (V)(1) could be impractical and hinder emergency care.

Response 39: The Board agrees with the comment and has amended the rule accordingly.

Comment 40: One commenter suggested that the requirement for documentation should be added to NEW RULE V(1) for verification of drug review.

Response 40: The Board agrees with the comment and has amended the rule accordingly.

Comment 41: One commenter questioned the necessity of pharmacist supervision regarding stocking of automated dispensing machines in NEW RULE V(2).

Response 41: The Board believes that pharmacist supervision does not necessarily have to be direct in this instance, but a pharmacist check must occur. A pilot tech-check-tech project has successfully been completed in one Montana institution, leading the way for approval of future pilot projects and upcoming changes in rule. Clarifying rules for automated dispensing machines will be proposed by the Board in the near future.

Comment 42: Three commenters stated that the NEW RULE V(3) requirement for pharmacist identification of drugs, herbals and alternative food supplements brought into a facility by a patient would be expensive, impractical and even impossible in some cases, and could cause unacceptable delay.

Response 42: The Board concludes that, due to the possibility of adverse reactions and serious if not fatal drug interactions, patient safety cannot be ensured if unidentified medications are given. Therefore, medications that cannot be properly identified should not be administered to a patient.

Comment 43: Two commenters suggested that the wording of NEW RULE V(3) be changed to allow the use of home medications without identification and inspection by a pharmacist if the medication is sent directly from another pharmacy to the institution.

Response 43: The Board believes that this requirement has been satisfied when a policy is adopted within an institution stating that medications sent directly from a pharmacy to the facility for a specific patient are considered to have been checked by a pharmacist.

Comment 44: One commenter suggested that maintenance of investigational drug information in NEW RULE (V)(4) be changed to be located within the facility, rather than the pharmacy, for practicality and greater flexibility.

Response 44: The Board agrees with the comment and has amended the rule accordingly.

Comment 45: One commenter on NEW RULE V(4) suggested that the term "state guidelines" be added to "federal guidelines" for completeness and accuracy.

Response 45: The Board agrees with the comment and has amended the rule accordingly.

Comment 46: One commenter questioned if the NEW RULE V could be supplemented to address procedures for handling investigational drugs approved by another investigational review board that have been brought into a facility by a patient for personal use.

Response 46: The Board believes that policies and procedures can be written within the individual institution to address the handling of investigational drugs in this instance.

Comment 47: One commenter suggested that the handling of prescription drug samples should have been mentioned in NEW RULE V.

Response 47: The Board agrees with the comment and has amended the rule accordingly.

Comment 48: Four commenters testified in support of NEW RULE VI(1)(e), stating that continuity of care is an important goal and that communication between sites must be improved for the sake of patient safety.

Response 48: The Board acknowledges the comments.

Comment 49: One commenter asked for clarification of the word "mechanism" in NEW RULE VI(1)(e).

Response 49: The Board agrees that the word "mechanism" is unclear. "Mechanism" is changed to "policy" for clarity.

Comment 50: Thirteen commenters stated that the requirements of NEW RULE VI(1)(e) were difficult, impractical, potentially costly and "beyond our scope of practice and ability".

Response 50: The Board has no desire to place practitioners in a difficult, impractical and costly situation. The Board has amended the language to require only an offer to convey the medication regimen upon discharge to the pharmacy or pharmacies of the patient's choice. However, the Board maintains that a pharmacist's responsibility doesn't end at discharge. Physicians and other practitioners who routinely send discharge summaries or letters to other practitioners also caring for the patient have set good precedent in this area.

Comment 51: One commenter stated that the continuity of care required by NEW RULE VI(1)(e) is a worthy goal, but that few if any non-HMO organizations are currently doing this nationwide. The commenter concluded by stating "This certainly is not a minimum standard."

Response 51: The Board agrees with the commenter, but again maintains that a pharmacist's responsibility doesn't end at discharge. An offer to convey the medication regimen upon

discharge could have a critical impact on patient outcomes.

Comment 52: Three commenters questioned whether the requirement of NEW RULE VI(1)(e) would violate final HIPAA regulations.

Response 52: The Board agrees that the commenters raise a valid point. The amended language, requiring only an offer to convey, should ease some privacy concerns and concern about compliance with HIPAA as any action would be requested and/or approved by the patient. The Board suggests that a photocopy or copies of only the medication portion of the discharge summary, or a photocopy of the final medication administration record (with diagnosis and other sensitive information omitted) could be sent along with the patient to give to their pharmacist, or sent or faxed to the pharmacies the patient requests at minimal expense and effort. Policies can be established to address the way in which this can most easily be accomplished within each individual institution. This intervention could minimize the chance of unexpected drug interactions or therapeutic duplication by alerting other pharmacies to the fact that medication changes have been made, and that consultation with the patient's physician or other practitioner could be in order.

Comment 53: One commenter stated that the provisions of NEW RULE VI(1)(e) would violate patient privacy, stating that "psychotic, sex, drugs, etc. are gossiped about" by pharmacists and pharmacy technicians, especially in small towns.

Response 53: The Board states that the offer to notify requires patient consent, making it voluntary for the patient to accept or refuse. Pharmacists and pharmacy technicians are professionals and the Board expects and requires them to act as such and maintain confidentiality concerning patient information.

Comment 54: One commenter stated that the requirements of NEW RULE VI(1)(e) "would lead to a restraint of trade issue" in which "the pharmacists want to keep all of a patient's business".

Response 54: The Board notes that the language of NEW RULE VI (1)(e) has been amended to require only an offer to convey discharge information. The Board does not see how restraint of trade would be an issue in this case.

Comment 55: Two commenters stated that NEW RULE VI(1)(e) ignores the fact that many patients patronize multiple pharmacies, and that it would be difficult and time consuming to fax information to multiple pharmacies.

Response 55: The Board concurs that some patients patronize

multiple pharmacies, and changed the term "home pharmacy" to "pharmacies" to address this point. The Board emphasizes that routinely patronizing more than one pharmacy is a potentially dangerous practice, as no one pharmacist has an accurate patient profile to consult. The Board believes a pharmacist who recognizes that a patient patronizes multiple pharmacies is presented with a unique and important opportunity for patient education.

Comment 56: Three commenters stated that NEW RULE VII(2) appears to require a clean room in addition to an appropriate biological safety cabinet, and that such a requirement would be expensive and difficult if not impossible for small rural hospitals.

Response 56: It is not the Board's intent to require a separate clean room. The Board has changed the wording of NEW RULE VII(2) from "restricted to entry by authorized personnel" to "isolated" for clarification.

Comment 57: Four commenters stated that the requirement of NEW RULE VII(3) that all sterile product preparation be done in a laminar flow hood or other aseptic environmental control device was potentially too costly for small rural hospitals.

Response 57: It is not the Board's desire to impose hardship upon rural hospitals. The board has changed the language of NEW RULE VII(3) to require "either an appropriate biological safety cabinet for sterile product admixture or policies that limit sterile product preparation". In making this decision, the board consulted several studies referenced by the American Society of Health Systems Pharmacists. For the protection of the patient, parenteral admixtures should ideally be prepared in some sort of aseptic environmental control device. Many small facilities mix only partial fills with a short hang time and large volume base solutions with electrolytes and/or multivitamins. These do not present the high risk for bacterial growth that some admixtures do, and could be safely mixed in merely a clean isolated area with careful aseptic technique. However, admixtures offering a prime environment for bacterial growth such as total parenteral nutrition and lipids, and sterile products for high-risk patients (immunocompromised, neonates, etc.), should be mixed in an aseptic environmental control device. The Board believes that in the absence of a hood, institutional policies can be written to delineate high-risk admixtures from simpler ones and limit the types of admixtures that can be prepared. The Board feels that this change will not unnecessarily put patients at risk.

Comment 58: Ten commenters stated that NEW RULE VII(4) requiring that non-cytotoxic drugs not be prepared in the same vertical flow Class II biological safety cabinet as cytotoxic drugs was unworkable for small facilities. Commenters cited

the possibility of "substantial new costs" and "unreasonable limits on current practice" which would "threaten to terminate chemotherapy services in some communities."

Response 58: The Board has no desire to impose hardship upon facilities or entire communities. After weighing the comments received, the Board has dropped the requirement that non-cytotoxic products should not be mixed separately in the same cabinet as cytotoxic drugs. The Board has a degree of concern about this change due to published studies on chemotherapy residue following cleaning of surfaces, but for now will rely on good cleaning technique of vertical flow hoods to minimize the risk of contamination, as well as good professional judgment.

Comment 59: One commenter on NEW RULE VIII stated, "Medication return from long term care facilities should be more liberalized to reduce the cost of care to its clients/state/insurance company/taxpayers. These meds are dispensed in unit dose containers and should be able to be reused on any patient without the amount of record keeping."

Response 59: The Board concludes that proper records are necessary to guarantee potency and protect patient safety, and to ensure compliance in the event of a drug lot recall.

Comment 60: One commenter questioned the meaning of the term "provisional pharmacy".

Response 60: The Board notes that the term "provisional community pharmacy" is defined in Chapter 362, Laws of 2001 (Senate Bill 288, codified as Title 37, chapter 7, part 14, MCA). The Board uses the term "provisional pharmacy" in this context as meaning the same as "provisional community pharmacy".

Comment 61: One commenter noted that "the time of closure and re-opening" in NEW RULE IX(2) could be confused with the regular opening and closing hours of the pharmacy.

Response 61: The Board agrees with the comment. The Board has amended NEW RULE IX(2) to read "the time of the meal/rest break" for increased clarity and accuracy.

Comment 62: Two commenters suggested that the term "drug utilization review" in NEW RULE IX(10) should be replaced by the term "prospective drug review" for accuracy.

Response 62: The Board agrees with the comment and has amended the rule accordingly.

Comment 63: Six commenters testified that the requirement of NEW RULE IX(2) to consistently schedule meal/rest breaks would potentially be unworkable and counterproductive. One commenter

stated "If the Board intends the term 'consistently scheduled breaks' to mean that breaks be taken at or about the same time each day, then we believe that this requirement would decrease pharmacists' professional satisfaction by removing pharmacists' judgment in determining the optimal time for a break." Other comments cited that the requirement would have "the adverse effect of raising pharmacists' stress."

Response 63: The Board agrees with the comments, and has deleted the requirement that breaks be consistently scheduled. The Board agrees that workload is not always a predictable factor, and that variations will occur. The Board hopes that the break will be somewhat predictable for the sake of patients, but agrees that establishing an absolute time in advance is not always practical.

Comment 64: One commenter stated, "Research on pharmacy errors has shown that the causes are more complicated than workload."

Response 64: The Board agrees the commenter makes a valid point, but notes that workload can be a major contributing factor.

Comment 65: Three commenters testified in support of a mandatory meal/rest break. One stated, "I would like to say thank you very much for proposing this rule. A meal break is a great common sense humanitarian thing for the practice. I am wholeheartedly behind it."

Response 65: The Board acknowledges the comments.

Comment 66: One commenter stated, "the board is . . . beginning to move away from providing the standards under which an institution can be licensed and moving toward facility management standards. Standards for licensure surely don't require the board to govern daily work rules. Federal and state statutes related to employment adequately protect worker rights."

Response 66: The Board notes, as do the Boards of Pharmacy in many jurisdictions, that a meal/rest break is not so much about protecting worker rights as protecting patient rights to health and safety. The Board concludes that a fatigued pharmacist may not make the best clinical decisions.

Comment 67: Two commenters questioned whether the meal/rest break requirement would force pharmacists in an institutional/long-term care setting to remain in the pharmacy rather than engage in consulting and clinical roles on the floor. One commenter voiced concern that the role of institutional pharmacists in a clinical/consultant role could be reduced to "a dispensing role only."

Response 67: The Board concludes that the new institutional practice regulations spell out the ability of the pharmacist in charge to define these circumstances in policy and procedure. NEW RULE V, Drug Distribution and Control in an Institutional Facility, provides that "The pharmacist-in-charge shall establish written policies and procedures for the safe and efficient distribution of drugs and provision of pharmaceutical care, including the mechanism by which drug review will be accomplished and documented. A current copy of such procedures must be on hand for inspection by the board of pharmacy." The Board recognizes that institutional pharmacists often perform clinical functions outside the pharmacy and no attempt has been made to change that. NEW RULE IX applies to a daily meal/rest break only.

Comment 68: Five commenters stated opposition to any mandatory meal/rest break, stating that the matter should be up to the professional judgment of the pharmacist, and that a forced break could add to a pharmacist's stress.

Response 68: The Board concludes that the language proposed, "up to 30 minutes per shift", provides maximum flexibility. The Board agrees that the duration of a break should remain a matter of professional judgment. However, the Board believes that a break must be taken even on the busiest of days to ensure patient safety.

Comment 69: Two commenters supported a mandatory break of at least 30 minutes daily.

Response 69: The Board concludes that the language proposed, "up to 30 minutes per shift", provides maximum flexibility, and that language was maintained in light of all comments received.

BOARD OF PHARMACY
ALBERT A. FISHER, R.Ph.,
PRESIDENT

By: /s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

By: /s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State, December 16, 2002.

BEFORE THE BUILDING CODES BUREAU
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the) NOTICE OF
amendment of ARM 24.301.142,) AMENDMENT
24.301.401, and 24.301.411,) AND REPEAL
and the repeal of ARM)
24.301.215, all pertaining)
to building codes)

TO: All Concerned Persons

1. On October 18, 2002, the Building Codes Bureau published a notice of proposed amendment and repeal of the above-stated rules at page 2833, 2002 Montana Administrative Register, Issue Number 19.

2. A public hearing on the proposed amendments and repeal were held on November 8, 2002. No public comments were received.

3. The Building Codes Bureau has amended and repealed the rules exactly as proposed.

/s/ KEVIN BRAUN
Kevin Braun
Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF ADOPTION,
of Rule I and the amendment	)	AMENDMENT AND REPEAL
of ARM 37.5.125, 37.30.101,)	
37.30.111, 37.30.304,)	
37.30.305, 37.30.405,)	
37.30.407, 37.30.706,)	
37.30.730, 37.30.1002,)	
37.30.1401, 37.30.1602,)	
37.30.1613 and 37.31.401 and)	
the repeal of 37.30.106,)	
37.30.301, 37.30.310,)	
37.30.411, 37.30.701,)	
37.30.702, 37.30.705,)	
37.30.711, 37.30.712,)	
37.30.713, 37.30.717,)	
37.30.718, 37.30.719,)	
37.30.723, 37.30.724,)	
37.30.725, 37.30.734,)	
37.30.735, 37.30.736,)	
37.30.805, 37.30.1403,)	
37.30.1603, 37.30.1608 and)	
37.30.1612 pertaining to)	
vocational rehabilitation and)	
independent living services)	

TO: All Interested Persons

1. On September 26, 2002, the Department of Public Health and Human Services published notice of the proposed adoption, amendment and repeal of the above-stated rules at page 2618 of the 2002 Montana Administrative Register, issue number 18.

2. The Department has amended ARM 37.30.304, 37.30.305, 37.30.405, 37.30.706, 37.30.730, 37.30.1401, 37.30.1602, 37.30.1613 and 37.31.401 and repealed ARM 37.30.106, 37.30.301, 37.30.310, 37.30.411, 37.30.701, 37.30.702, 37.30.705, 37.30.711, 37.30.712, 37.30.713, 37.30.717, 37.30.718, 37.30.719, 37.30.723, 37.30.724, 37.30.725, 37.30.734, 37.30.735, 37.30.736, 37.30.805, 37.30.1403, 37.30.1603, 37.30.1608 and 37.30.1612 as proposed.

3. The Department has adopted Rule I (ARM 37.30.102) as proposed.

4. The Department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

37.5.125 VOCATIONAL REHABILITATION AND BLIND AND LOW VISION SERVICES PROGRAMS: SERVICES APPLICABLE HEARING PROCEDURES (1) Hearings relating to the provision of vocational rehabilitation services inclusive of the blind and low vision services program are available to the extent granted and as provided in ARM 37.30.1401. The provisions of ARM 37.5.307, 37.5.310, 37.5.311, 37.5.316, 37.5.328 and 37.5.331 do not apply to such hearings.

AUTH: Sec. 53-2-201, 53-6-113, 53-7-102, 53-7-206 and 53-7-315, MCA

IMP: Sec. 53-7-102, 53-7-106, 53-7-206, 53-7-314, 53-7-315 and 53-19-112, MCA

37.30.101 DEFINITIONS (1) "Applicant" means a person who has made formal application to the department to receive vocational rehabilitation or other services administered by the Montana vocational rehabilitation program inclusive of the blind and low vision services program of the department.

(2) through (10) remain as proposed.

(11) "Montana vocational rehabilitation program (MVR)" means the program of federal and state authorized vocational rehabilitation services for persons with disabilities provided through the department's disability services division, inclusive of the blind and low vision services program and those federal programs authorized at 29 USC 701, et seq.

(12) and (13) remain as proposed.

(14) "Person with a most significant disability" means a person with a disability:

(a) who has a severe physical or mental impairment that seriously limits three or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance or work skills) in terms of an employment outcome;

(b) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(c) who has:

(i) one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease or another disability; or

(ii) a combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.

(15) "Person with a significant disability" means a person with a disability:

(a) who has a severe physical or mental impairment that seriously limits at least one functional capacity (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance or work skills) in terms of an employment outcome;

(b) whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and

(c) who has:

(i) one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stroke and epilepsy), spinal cord conditions (including paraplegia and quadriplegia), sickle cell anemia, specific learning disability, end-stage renal disease or another disability; or

(ii) a combination of disabilities determined on the basis of an assessment for determining eligibility and vocational rehabilitation needs to cause comparable substantial functional limitation.

(14) through (16) remain as proposed but are renumbered (16) through (18).

(19) "Serious limitation" or "seriously limits" means a reduction in capacity due to severe physical or mental impairment to the degree that the person requires vocational rehabilitation services or accommodations not typically made for other persons in order to prepare for, secure, retain or regain employment.

(17) through (19) remain as proposed but are renumbered (20) through (22).

AUTH: Sec. 53-7-102, 53-7-203, 53-7-206, 53-7-302, 53-7-315 and 53-19-112, MCA

IMP: Sec. 53-7-101, 53-7-103, 53-7-105, 53-7-106, 53-7-107, 53-7-108, 53-7-109, 53-7-201, 53-7-202, 53-7-203, 53-7-204, 53-7-205, 53-7-206, 53-7-301, 53-7-302, 53-7-303, 53-7-306, 53-7-310, 53-7-314, 53-7-315, 53-19-101, 53-19-102, 53-19-103, 53-19-104, 53-19-105, 53-19-106, 53-19-110 and 53-19-112, MCA

37.30.111 VOCATIONAL REHABILITATION PROGRAM: ORDER OF SELECTION (1) remains as proposed.

(2) The categories and ranking for priority of service among applicants and persons otherwise eligible for services are as follows:

(a) priority one is eligible persons with most significant disabilities experiencing serious limitations in four or more functional capacities;

(b) priority two is eligible persons with most significant disabilities experiencing serious limitations in at least three ~~or more~~ functional capacities who are not in priority one; and

(c) priority three is eligible persons with significant

disabilities experiencing serious limitations in ~~one or more~~ at least two functional capacities who are not in priority one or two; and

(d) priority four is all other eligible persons with disabilities who are not in priorities one, two or three.

(3) and (4) remain as proposed.

AUTH: Sec. 53-7-102 and 53-7-315, MCA

IMP: Sec. 53-7-102, 53-7-103, 53-7-105, 53-7-302 and 53-7-303, MCA

37.30.407 VOCATIONAL REHABILITATION PROGRAM:
DETERMINATION OF FINANCIAL RESPONSIBILITY (1) through (3)(b) remain as proposed.

(4) The following assets are excluded as financial resources:

(a) the consumer's, the consumer's spouse's or the consumer's parents' home;

(b) a small business or farm owned by the consumer, the consumer's spouse or the consumer's parents, in the case of a minor, if that business or farm is determined by the department to be the primary source of income for the consumer, the consumer's spouse or the consumer's parents or is a major asset;

(c) the consumer's or the consumer's spouse's individual retirement accounts; and

(d) the consumer's trust funds established as a result of disability to assist with the present and future medical and independent living expenses of the consumer.

(5) remains as proposed.

AUTH: Sec. 53-7-102 and 53-7-315, MCA

IMP: Sec. 53-7-102, 53-7-105, 53-7-108 and 53-7-310, MCA

37.30.1002 STANDARDS FOR PROVIDERS: ENROLLMENT AS A PROVIDER OF PROGRAMS OR SERVICES (1) A provider of services for applicants or consumers of services provided through this chapter that is an incorporated corporation delivering a program of vocational rehabilitation, visual rehabilitation, extended employment services or independent living services in order to become enrolled with the department as qualified to be a provider must be accredited by the appropriate accrediting body as specified on the following list:

(a) for vocational rehabilitation facilities and similar providers, the standards of the commission of accreditation of rehabilitation facilities (CARF); and

(b) for providers serving persons with visual disabilities, the standards of the national accrediting council (NAC) or of CARF; and

~~(b)~~ (c) for providers of independent living services, the standards of the national council on disability (NCD).

(2) Copies of the standards adopted and incorporated by reference in this rule may be obtained as follows:

(a) ~~The~~ CARF standards may be obtained by temporary loan from the department through the Department of Public Health and

Human Services, Disability Services Division, P.O. Box 4210, Helena, MT 59604-4210 or by purchase from CARF, 4891 E. Grant Road, Tucson, AZ 85712-; and

(b) the NAC standards may be obtained by temporary loan from the department through the Department of Public Health and Human Services, Disability Services Division, P.O. Box 4210, Helena, MT 59604-4210 or by purchase from NAC, 15 E. 40th Street, Suite 1004, New York, NY 10016.

(3) through (6)(a) remain as proposed.

AUTH: Sec. 53-7-102, 53-7-203, 53-7-206, 53-7-302 and 53-7-315, MCA

IMP: Sec. 53-7-102, 53-7-103, 53-7-203, 53-7-302 and 53-7-303, MCA

5. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: Comments were received that opposed the proposed deletion of references in the rules to the Department's program serving persons who are blind or have low vision. The commentors were concerned that the proposed deletions of the references to that program are indicative of the intent of the Department to abandon that program.

RESPONSE: The Department has no intention of eliminating the Blind and Low Vision Services Program. The proposed deletion of the references was initiated as an effort to edit unnecessary language from the rules. The Department has restored the appropriate references to the Blind and Low Vision Services Program.

COMMENT #2: A comment was received noting that the proposed language in ARM 37.30.111 was confusing in that a person could potentially qualify for both priorities one and two for order of selection.

RESPONSE: The Department agrees that there is the potential for confusion in the language of the provision as proposed. The Department has reworded both the definition of "a person with a most significant disability" and the language for the priorities to eliminate the potential for ambiguity. The rewordings do not alter who would have been eligible to receive services in the four priorities, but we believe they both simplify and clarify the intent. In addition, a definition of the other predicate term "a person with a significant disability" has been included.

COMMENT #3: A comment was received which expressed concern that consumers whose serious limitations in functional capacity required long term supports at the job site may not qualify in some instances as a person with a most significant disability for purposes of receiving priority one in the order of selection. The commentor recommended making these consumers

eligible for priority one based on their historic identity as consumers with the most significant disabilities. These consumers who have needs for long term supports are very frequently already on waiting lists for the long term post vocational rehabilitation supports. By making them priority one consumers, the Department also assures they can be served when their name comes up on the waiting list for extended service funding.

RESPONSE: We have attempted a number of rewordings of the definition of an individual with a most significant disability and could not find a way to resolve this issue that satisfied the federal regulations for order of selection. The regulations prohibit states from developing an order around a specific service or disability. In this situation, the long term support services were interpreted at the federal level as the designation of a specific type of service which could not be included in the priorities.

COMMENT #4: A commentor noted that there is no formal definition for the term "serious limitation" which is a predicate term for the application of the priorities for selection to be served.

RESPONSE: The Department agrees there is a need for definition to the term "serious limitations" or "seriously limits" and has adopted a definition used by other states that have proceeded with the implementation of order of selection. The definition, as adopted, is employed to further flesh out the governing mandates federally required with respect to order of selection. The adopted language appears as a definition in ARM 37.30.101(18).

COMMENT #5: One commentor noted a discrepancy in ARM 37.30.407 Vocational Rehabilitation Program: Determination Of Financial Responsibility. While the rule provided for the consideration of spouse's resources when determining if a consumer met the financial standard, the same rule did not include the spouse's assets in the section which provided for certain exclusions financial assets.

RESPONSE: The Department agrees with the commentor and has consequently in the final adoption of the rule inserted references to the consumer's spouse in the language concerning excluded financial assets.

COMMENT #6: One commentor pointed out that a number of terms were used to describe a Montana vocational rehabilitation (MVR) recipient of services including "client", "consumer" and "individual". That commentor expressed a preference for the term "client".

RESPONSE: The Montana Vocational Rehabilitation Council, the federally mandated advisory body for the Vocational

Rehabilitation Program, has indicated its preference for the term "consumer". On November 13, 2002 that group was again approached to determine if it preferred the term "consumer". The terms were discussed and debated once again and the conclusion was that "consumer", while not enjoyed by all, was still the Council's preference.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the	)	CORRECTED NOTICE OF
amendment of ARM 37.70.107,	)	AMENDMENT
37.70.110, 37.70.305,)	
37.70.312, 37.70.401,)	
37.70.402, 37.70.406,)	
37.70.407, 37.70.408,)	
37.70.601, 37.70.608,)	
37.71.107, 37.71.110,)	
37.71.301, 37.71.601 and)	
37.71.602 pertaining to LIEAP)	
and LIWAP)	

TO: All Interested Persons

1. On September 26, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 2604 of the 2002 Montana Administrative Register, issue number 18, and on November 27, 2002 published notice of the amendment on page 3328 of the 2002 Montana Administrative Register, issue number 22.

2. This corrected notice is being filed to correct an error in the adoption notice concerning the implementation date of the rule amendments. The correction is as shown in paragraph 3 below.

3. These rule amendments are being applied retroactively to August 1, 2002. This is necessary because the Department has been accepting and processing applications from clients using certain types of heating fuels since August 1, 2002, although applications by most clients were not filed until after October 1, 2002. The Department is applying the rule changes retroactively so that the higher 2002 income guidelines and benefit amounts in determining eligibility and benefit awards could be applied to the early filing applicants.

4. In the proposal notice, the Department indicated in paragraph 4 of the notice that the rule changes would be applied effective August 1, 2002. The Department inadvertently neglected to place the effective implementation date in the adoption notice. Although it is not necessary, in order to prevent any misunderstanding, the Department is filing this notice to clarify that these rule amendments are still to be applied effective retroactively to August 1, 2002.

5. All other rule changes remain as adopted.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of ARM 37.85.212)
pertaining to medicaid)
reimbursement for subsequent)
surgical procedures)

TO: All Interested Persons

1. On October 17, 2002, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rule at page 2884 of the 2002 Montana Administrative Register, issue number 19. A corrected notice of public hearing was published at page 2978 of the 2002 Montana Administrative Register, issue number 20.

2. The Department has amended ARM 37.85.212 as proposed.

3. No comments or testimony were received.

4. These rule amendments will be effective January 1, 2003, rather than December 1, 2002, as stated on the proposed notice of amendment. The amendments are to be effective on the first day of January because it is easier administratively to have a change in reimbursement effective on the first day of the month. Due to time and staff constraints, the Department was not able to file this notice finalizing the proposed changes in time for the originally proposed effective date.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF ADOPTION AND
of new rules I through XLVIII	)	REPEAL
and the repeal of ARM)	
37.106.2701, 37.106.2702,)	
37.106.2703, 37.106.2708)	
through 37.106.2711,)	
37.106.2715 through)	
37.106.2719, 37.106.2725)	
through 37.106.2731,)	
37.106.2740 through)	
37.106.2742 and 37.106.2750)	
pertaining to personal care)	
facilities)	

TO: All Interested Persons

1. On October 17, 2002, the Department of Public Health and Human Services published notice of the proposed adoption and repeal of the above-stated rules at page 2839 of the 2002 Montana Administrative Register, issue number 19.

2. The Department has adopted rules I [37.106.2801], II [37.106.2802], III [37.106.2803], IV [37.106.2804], VI [37.106.2809], VII [37.106.2810], XX [37.106.2835], XXII [37.106.2837], XXVI [37.106.2846], XXXVII [37.106.2866], XXXIX [37.106.2873] and XLIV [37.106.2880] as proposed. The Department has decided not to adopt rule XLII.

3. The Department has repealed ARM 37.106.2701 through 37.106.2703, 37.106.2708 through 37.106.2711, 37.106.2715 through 37.106.2719, 37.106.2725 through 37.106.2731 and 37.106.2740 through 37.106.2742 as proposed.

4. The Department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE V [37.106.2805] DEFINITIONS The following definitions apply in this subchapter:

(1) through (7) remain as proposed.

(8) "Direct care staff" means a person or persons ~~at least 18 years of age,~~ who directly assist residents with personal care services and medication. It does not include housekeeping, maintenance, dietary, laundry, administrative or clerical staff at times when they are not providing any of the above-mentioned assistance. Volunteers can be used for direct care, but may not be considered part of the required staff.

(9) remains as proposed.

(10) "Health care service" means any service provided to a

~~category B~~ resident of a personal care facility that is ordered by a practitioner and required to be provided or delegated by a licensed, registered or certified health care professional. Any other service, whether or not ordered by a physician or practitioner, that is not required to be provided by a licensed, registered, or certified health care professional is not to be considered a health care service.

~~(11) "Involuntary transfer or discharge" means the involuntary discharge of a resident from the licensed facility or the involuntary transfer of a resident to a bed outside of the licensed facility. The term does not include the transfer of a resident from one bed to another within the same licensed facility, or the temporary transfer or relocation of the resident outside the licensed facility for medical treatment.~~

(12) remains as proposed but is renumbered (11).

~~(13)~~ (12) "Licensed health care professional" means a physician, a physician assistant-certified, a an advanced practice registered nurse practitioner, or a registered nurse practicing within the scope of their license.

(14) through (16) remain as proposed but are renumbered (13) through (15).

~~(17)~~ (16) "Personal care facility" or "facility" means a home, facility or institution that is licensed to provide in which personal care is provided for to either category A or category B residents under 50-5-227, MCA.

(18) and (19) remain as proposed but are renumbered (17) and (18).

~~(20)~~ (19) "Resident" means anyone at least 18 years of age accepted for care, through contractual agreement, in a personal care facility.

(21) through (22)(b) remain as proposed but are renumbered (20) through (21)(b).

(22) "Self-administration assistance" means providing necessary assistance to any resident in taking their medication, including:

(a) removing medication containers from secured storage;

(b) providing verbal suggestions, prompting, reminding, gesturing or providing a written guide for self-administering medications;

(c) handing a prefilled, labeled medication holder, labeled unit dose container, syringe or original marked, labeled container from the pharmacy or a medication organizer as described in ARM 37.106.2847 to the resident;

(d) opening the lid of the above container for the resident;

(e) guiding the hand of the resident to self-administer the medication;

(f) holding and assisting the resident in drinking fluid to assist in the swallowing of oral medications; and

(g) assisting with removal of a medication from a container for residents with a physical disability which prevents independence in the act.

~~(23) "Service coordination" means facility or staff assistance provided to the resident to enhance the functioning~~

of the resident. These include, that the facility either directly provides or assists the resident to procure services including, but are not limited to:

(a) through (h) remain as proposed.

(24) "Service plan" means a written plan for services developed by the facility with the resident or resident's legal representative ~~or significant other~~ which reflects the resident's capabilities, choices and, if applicable, measurable goals and risk issues. The plan is developed on admission and is reviewed and updated annually and if when there is a significant change in the resident's condition. The development of the service plan does not require a licensed health care professional.

(25) remains as proposed.

(26) "Significant event" means a change in health status that requires care from a licensed health care professional:

(a) change in resident services;

(b) explained or unexplained injuries to the resident that require medical intervention or first aid; or

(c) resident on resident, resident on staff or staff on resident aggression.

(26) remains as proposed but is renumbered (27).

~~(27)~~ (28) "Third party services" means care and services provided to a resident by individuals having or entities who have no fiduciary interest in the facility.

(28) remains as proposed but is renumbered (29).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE VIII [37.106.2814] ADMINISTRATOR (1) remains as proposed.

(2) No personal care facility may employ an administrator who does not meet the following minimum requirements:

(a) remains as proposed.

(b) have proof of holding a current and valid nursing home administrator license from another state; or

~~(b)~~ (c) have successfully completed all of the self study modules of "The Management Library for Administrators and Executive Directors", a component of the assisted living training system published by the assisted living federation of America university (ALFA); or

(i) be enrolled in the self study course referenced above, with a six month successful completion; and

~~(e)~~ (d) the administrator must show evidence of at least 16 contact hours of annual continuing education which shall be relevant to the individual's duties and responsibilities as administrator of the assisted living facility. ~~to include at least three of the following areas:~~

~~(i) accounting and budgeting;~~

~~(ii) basic principles of supervision;~~

~~(iii) basic and advanced emergency first aid;~~

~~(iv) characteristics and needs of residents;~~

~~(v) community resources;~~

~~(vi) pharmacy, medication dispensing, medication security, drug contraindications, interactions, reactions and expected outcomes;~~

~~(vii) resident and provider rights and responsibilities, abuse or neglect or confidentiality; or~~

~~(viii) skills for working with residents, families and other professional service providers.~~

(3) In the absence of the administrator, a staff member must be designated to oversee the operation of the facility during the administrator's absence. The administrator or designee shall be in charge, on call and physically available on a daily basis as needed, and shall ensure there are sufficient, qualified staff so that the care, well being, health and safety needs of the residents are met at all times. The administrator or designee may not be a resident of the facility.

(a) a designee must:

(i) be age 18 or older; and

(ii) have demonstrated competencies required to assure protection of the safety and physical, mental and emotional health of residents.

(3) through (4) remain as proposed but are renumbered (4) through (5).

~~(5) In the absence of the administrator, a staff member must be designated to oversee the operation of the facility during the administrator's absence. The administrator or designee shall be in charge, on call and physically available on a daily basis as needed, and shall ensure there are sufficient, qualified staff so that the care, well being, health and safety needs of the residents are met at all times. The administrator or designee may not be a resident of the facility.~~

(6) The administrator or designee shall initiate transfer of a resident through the resident and/or the resident's practitioner, appropriate agencies or the resident's personal representative or responsible party when the resident's condition is not within the scope of services of the personal care facility.

(7) through (11) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE IX [37.106.2815] WRITTEN POLICIES AND PROCEDURES

(1) A policy and procedure manual for the organization and operation of the personal care facility shall be developed, implemented, kept current and reviewed as necessary to assure the continuity of care and day to day operations of the facility. Each review of the manual shall be documented, and the manual shall be available in the facility to staff, residents, residents' legal representatives and representatives of the department at all times.

(2) remains as proposed.

~~(3) The manual must include a disaster plan that includes a facility evacuation plan in the event of fire and a plan for a backup source of oxygen, if oxygen is in use.~~

~~(4) The manual must include resident advance directives, if accepted by the facility, to include:~~

~~(a) the circumstances under which an inquiry will be made of individuals regarding the existence of an advance directive;~~

~~(b) the location of the resident's advance directive;~~

~~(c) documentation requirements in the resident record; and~~

~~(d) a precise statement of any limitations if the provider cannot implement a resident's advance directive under [Rule XVI].~~

~~(5) The manual must include appropriate emergency telephone numbers, including the poison control center number. Emergency telephone numbers must also be prominently posted near facility telephones.~~

~~(6) The manual must include infection control requirements that include, at a minimum, the elements set forth in [Rule XXXI].~~

~~(7) The manual must include orientation requirements for staff and volunteers.~~

~~(8) The manual must include written policies and procedures for the delivery of personal or direct care to residents which encourage each resident to maintain their independence and personal decision making abilities.~~

~~(9) The manual must include written policies and procedures for staffing levels required to ensure the delivery of services and assistance as needed for each resident of the facility during each 24 hour period. Services may be provided directly by staff employed by the facility or in accordance with a written contract.~~

~~(10) The manual must include written policies and procedures for provision of emergency first aid and emergency medical and dental care of residents, including notification of the resident's family, legal representative or guardian and the resident's physician or practitioner.~~

~~(11) The manual must include written policies and procedures for recording and addressing adverse reactions to medication, unexpected effects of medications and medication errors.~~

~~(12) The manual must include written policies and procedures regarding criteria for the discharge, transfer and readmission of residents, as well as for involuntary termination.~~

~~(13) The manual must include written policies and procedures for resident absences from the facility and when the resident's absence from the facility should be investigated.~~

~~(14) The manual must include written policies and procedures for maintaining the confidentiality of resident records, including a procedure for examination of the resident records by the resident and/or other authorized persons.~~

~~(15) The manual must include written policies and procedures for resident transportation to appointments or events outside of the facility.~~

~~(16) The manual must include written policies and procedures for the provision of resident service coordination provided by the facility.~~

~~(17) The manual must include written policies and procedures for the control and care of pets, as allowed by the facility.~~

~~(18) The manual must include written policies and procedures for resident, visitor and staff smoking in the facility.~~

~~(19) The manual must include written policies and procedures for maintaining the security of:~~

- ~~(a) the building and grounds;~~
- ~~(b) facility records;~~
- ~~(c) medications; and~~
- ~~(d) stored resident's personal belongings.~~

~~(20) The manual must include written policies and procedures for ongoing and scheduled physical plant maintenance.~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE X [37.106.2816] PERSONAL CARE FACILITY STAFFING

~~(1) The administrator shall develop minimum qualifications for the hiring of direct care staff and support staff practices to identify employees that may pose risk or threat to the health, safety or welfare of any resident and provide written documentation of findings in the employee file.~~

~~(2) The administrator shall develop policies and procedures for screening, hiring and assessing staff which include practices that assist the employer in identifying employees that may pose risk or threat to the health, safety or welfare of any resident and provide written documentation of findings and the outcome in the employee's file.~~

~~(2) (3) Direct care staff New employees shall receive orientation and training, as specified in the facility's policies and procedures manual. Training shall include in areas relevant to the employee's duties and responsibilities, including:~~

~~(a) an overview of the facility's policies and procedures manual in areas relevant to the employee's job responsibilities;~~

~~(b) and (c) remain as proposed.~~

~~(d) Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act found at 52-3-801, MCA; and~~

~~(e) Montana Long-Term Care Resident Bill of Rights Act found at 50-5-1101, MCA.~~

~~(d) how to perform care directed to a resident's activities of daily living (ADL);~~

~~(e) basic techniques in observation or reporting skills of resident's mental, psychosocial and physical health;~~

~~(f) changes associated with the aging processes including dementia;~~

~~(g) resident rights, including confidentiality;~~

~~(h) assisting resident mobility including transfer;~~

~~(i) techniques in lifting;~~

~~(j) food and nutrition;~~

~~(k) the location of resident records and the implementation of resident service and health care plans;~~

- ~~(l) assistance with medications and resident's medication records;~~
- ~~(m) adverse and desired medication reactions or actions;~~
- ~~(n) responding to behavior issues and redirection;~~
- ~~(o) emergency procedures, such as basic first aid, cardiopulmonary resuscitation (CPR) certification, and procedures used to contact outside agencies, physicians, family members or resident's legal representative or other individuals;~~
- ~~(p) simulated fire prevention, evacuation and disaster drills;~~
- ~~(q) basic techniques of identifying and correcting potential safety hazards in the facility;~~
- ~~(r) standard precautions for infection control;~~
- ~~(s) food preparation, service and storage, if applicable;~~
- ~~(t) Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act found at 52-3-801, MCA; and~~
- ~~(u) Montana Long Term Care Resident Bill of Rights Act found at 50-5-1101, MCA.~~

(4) In addition to meeting the requirements of (3), direct care staff shall be trained to perform the services established in each resident service plan.

~~(3) (5) Direct care staff shall be trained in the use of the Heimlich maneuver and basic first aid, if If the facility offers cardiopulmonary resuscitation (CPR), at least one person per shift shall hold a current CPR certificate.~~

~~(4) (6) The following rules must be followed in staffing the personal care facility:~~

~~(4)(a) through (4)(d) remain as proposed but are renumbered (6)(a) through (6)(d).~~

~~(e) facility staff may not perform any health care service that has not been appropriately delegated under the Montana Nurse Practice Act or in the case of is restricted to performance by licensed health care professionals that is beyond the scope of their license.~~

~~(5) (7) Employees and volunteers may perform support services, such as cooking, housekeeping, laundering, general maintenance and office work after receiving an orientation to the appropriate sections of the facility's policy and procedure manual. Any person providing direct care, however, is subject to the orientation and training requirements for direct care staff listed above.~~

~~(6) (8) Volunteers may be utilized in the facility, but may not be included in the facility's staffing plan in lieu of facility employees. In addition, the use of volunteers is subject to the following:~~

~~(a) volunteers must be supervised and be familiar with resident rights and the facility's policy and procedures which apply to their duties as a volunteer procedure manual; and~~

~~(b) remains as proposed.~~

~~(7) remains as proposed but is renumbered (9).~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XI [37.106.2817] EMPLOYEE FILES (1) The facility is responsible for maintaining a file on each employee and substitute personnel, ~~which includes emergency contact information.~~

(2) The following documentation from Employee employee files must be made available to the department at all reasonable times, but shall be made available to the department within 24 hours after the department requests to review the files.:

(a) the employee's name;

(b) a copy of current credentials, certifications or professional licenses as required to perform the job description;

(c) an initialed copy of the employee's job description;
and

(d) initialed documentation of employee orientation and ongoing training including documentation of Heimlich maneuver training, basic first aid and CPR.

~~(3) The file for each employee shall include:~~

~~(a) the employee's name, address, phone number and social security number;~~

~~(b) documentation of Heimlich maneuver training;~~

~~(c) a copy of current credentials, certifications or professional licenses as required to perform the job description;~~

~~(d) an initialed copy of the employee's job description;~~
and

~~(e) initialed documentation of training and orientation to facility policy and procedures.~~

~~(4) (3) The facility shall keep an employee file that meets the requirements set forth in (3) (2) for the administrator of the facility, even when the administrator is the owner.~~

(5) and (5)(a) remain as proposed but are renumbered (4) and (4)(a).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XII [37.106.2821] RESIDENT APPLICATION AND SCREENING NEEDS ASSESSMENT PROCEDURE (1) All facilities must develop a written application procedure for admission to the facility, which includes the prospective resident's name and address, sex, date of birth, marital status and religious affiliation (if volunteered). ~~including an application form requiring the following:~~

~~(a) the prospective resident's name and address, sex, date of birth, marital status and religious affiliation (if volunteered);~~

~~(b) an emergency contact with phone number; and~~

~~(c) the prospective resident's practitioner's name, address, telephone number and whether there are any health care decision making instruments in effect.~~

(2) remains as proposed.

(3) Prior to admission the facility shall conduct an

initial resident needs assessment screening to determine the prospective resident's needs.

(4) The department shall collect a screening fee of \$100 from a prospective resident, resident or facility appealing a rejection or relocation decision made pursuant to ARM 37.106.2821, to cover the cost of the independent nurse resident needs assessment.

(5) The initial resident's needs assessment resident screening must include documentation of the following:

(a) ~~an assessment of the prospective resident's medical, psychiatric or psychological needs, if any~~ cognitive patterns: short-term memory, long term memory, memory recall, decision making change in cognitive status/awareness or thinking disorders;

(b) ~~height and weight~~ sensory patterns: hearing, ability to understand others, ability to make self understood and ability to see in adequate light;

(c) ~~prescription medications and evaluation of the resident's ability to self administer the medication~~ activities of daily living (ADL) functional performance: ability to transfer, locomotion, mobility devices, dressing, eating, use of toilet, bladder continence, bowel continence, continence appliance/programs and bathing;

(d) ~~dietary requirements, including any food allergies or restrictions; and mood and behavior patterns, sadness or anxiety displayed by resident, wandering, verbally abusive, physically abusive and socially inappropriate/disruptive behavior;~~

(e) ~~a functional assessment which evaluates how the resident performs activities of daily living.~~ health problems/accidents;

(f) weight/nutritional status: current weight and nutritional complaints;

(g) skin problems;

(h) medication use: takes prescription and/or over-the-counter, recent changes, currently taking an antibiotic, antipsychotic use, antianxiety/hypnotic use and antidepressant use; and

(i) use of restraints, safety or assistive devices.

~~(6) Based on the initial screening, an initial service plan shall be developed for all category A residents. The initial service plan shall be reviewed or modified within 60 days of admission to assure the service plan accurately reflects the resident's needs and preferences.~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIII [37.106.2822] RESIDENT SERVICE PLAN: CATEGORY A (1) A service plan shall be developed and followed for each category A resident. Based on the initial resident's needs assessment, an initial service plan shall be developed for all category A residents. The initial service plan shall be reviewed or modified within 60 days of admission to assure the service plan accurately reflects the resident's needs and

preferences.

(2) The service plan shall include a written description of:

- (a) ~~who will provide the service what the service is;~~
- (b) ~~what the service is who will provide the service;~~
- (c) and (d) remain as proposed.
- (e) changes in service and the reasons for those changes;

and

- (f) if applicable, the desired outcome-;
- (g) an emergency contact with phone number; and
- (h) the prospective resident's practitioner's name, address, telephone number and whether there are any health care decision making instruments in effect if applicable.

(3) The resident's needs assessment and service plan shall be reviewed and updated annually, or any time the resident's needs change significantly and updated as needed.

(4) remains as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIV [37.106.2823] RESIDENT AGREEMENT (1) A personal care facility shall enter into a written resident agreement with each prospective resident prior to admission to the personal care facility. The agreement shall be signed and dated by a facility representative and the prospective resident or their legal representative. The facility shall provide the prospective resident or their legal representative a copy of the agreement and shall explain the agreement to them. The agreement shall include at least the following items:

- (a) and (b) remain as proposed.
- (c) the extent that specific assistance will be provided by the facility as specified in the resident service plan to the resident with the activities of daily living.
- (d) through (2) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XV [37.106.2824] INVOLUNTARY DISCHARGE CRITERIA

(1) Residents shall be given a written 30 day notice when they are requested to move-out. The administrator or designee shall initiate transfer of a resident through the resident's physician or practitioner, appropriate agencies, or the resident, resident's personal representative or responsible party when:

- (a) through (c) remain as proposed.
- (d) the resident has a medical condition that is complex, unstable or unpredictable and treatment cannot be appropriately developed in the personal care environment; ~~or~~
- (e) the resident has had a significant change in condition that requires medical or psychiatric treatment outside the facility and at the time the resident is to be discharged from that setting to move back into the personal care facility,

appropriate facility staff have re-evaluated the resident's needs and have determined the resident's needs exceed the facilities level of service. Temporary absence for medical treatment is not considered a move-out; or

(f) the resident has failed to pay charges after reasonable and appropriate notice.

~~(2) The administrator or designee may initiate transfer of a resident through the resident's physician or practitioner, appropriate agencies, the resident or resident's personal representative or responsible party when:~~

~~(a) there is resident nonpayment of charges;~~

~~(b) the discharge or transfer is by facility discretion;~~
or

~~(c) the transfer or discharge is for circumstances not listed in the rule.~~

(3) through (4)(c) remain as proposed but are renumbered (2) through (3)(c).

~~(5) (4) A resident has a right to a fair hearing to contest an involuntary transfer or discharge.~~

(a) "Involuntary transfer or discharge" is defined in ARM 37.106.2805 means the involuntary discharge of a resident from the licensed facility or the involuntary transfer of a resident to a bed outside of the licensed facility. The term does not include the transfer of a resident from one bed to another within the same licensed facility, or the temporary transfer or relocation of the resident outside the licensed facility for medical treatment.

(5)(b) through (5)(f) remain as proposed but are renumbered (4)(b) through (4)(f).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVI [37.106.2828] RESIDENT RIGHTS (1) The facility shall comply with the Montana Long-Term Care Residents' Bill of Rights long term care residents' bill of rights, found at 50-5-1101, et seq., MCA. This includes the posting of the facility's statement of resident rights in a conspicuous place. Prior to or upon admission of a resident, the personal care facility shall explain and provide the resident with a copy of the Montana Long-Term Care Residents' Bill of Rights long term care residents' bill of rights.

(2) through (5) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVII [37.106.2829] RESIDENT FILE (1) remains as proposed.

(2) The file shall include at least the following:

(a) through (e) remain as proposed.

(f) reports of significant events including: and facility contacts with family members or another responsible party;

(i) the provider's response to the event;

(ii) steps taken to safeguard the resident; and
(iii) facility contacts with family members or another responsible party;

(g) a record of communication between the facility and the resident or their representative if there has been a change in the resident's status or a need to discharge; and

~~(h) an inventory of personal possessions of significance, as stated by the resident or their representative; and~~

~~(i) (h) the date and circumstances of the resident's final transfer, discharge, or death, including notice to responsible parties and disposition of personal possessions.~~

(3) remains as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XVIII [37.106.2830] THIRD PARTY SERVICES (1) and (2) remain as proposed.

~~(3) If a resident of a category A facility receives third party services, the facility is responsible for documenting the resident is receiving third party services.~~

~~(4) The third party service shall enter progress notes of the services provided to the resident at the facility for the client record, and will as necessary participate with development, or modification of the resident health care plan to assure continuity of care.~~

(5) remains as proposed but is renumbered (3).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XIX [37.106.2831] RESIDENT ACTIVITIES (1) and (2) remain as proposed.

~~(3) This program must assist residents with arrangements to participate in social, recreational, religious or other activities within the facility and in the community in accordance with individual interests and capabilities.~~

(4) and (5) remain as proposed but are renumbered (3) and (4).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXI [37.106.2836] FURNISHINGS (1) Each resident in a personal care facility must be provided the following at a minimum by the facility:

~~(a) unless provided by the resident, a bed with a comfortable and clean mattress at least 36 inches wide and made up with two serviceable clean sheets, a blanket, a pillow and a bedspread. Additional bedding, including rubber or other protective sheets, must be provided as necessary;~~

~~(b) (a) individual towel rack;~~

~~(c) individual chair in their bedroom;~~

~~(d) separate dresser or drawers for each occupant in a~~

bedroom;

~~(e) reading lamp or equivalent for each bed;~~

~~(f) (b) handicap accessible mirror mounted or secured to allow for convenient use by both wheelchair bound residents and ambulatory persons;~~

~~(g) (c) clean, flame-resistant or non-combustible window treatments or equivalent, for every bedroom window;~~

~~(h) (d) an electric call system comprised of a fixed manual, pendant cordless or two way interactive, UL or FM listed system, must be provided connecting resident rooms to the care staff center or staff pagers; and~~

~~(i) (e) for each multiple-bed room, either flame-resistant privacy curtains for each bed or movable flame-resistant screens to provide privacy upon request of a resident.~~

~~(2) Upon the request of a resident, a personal care facility shall allow the use of personal furniture and furnishings in lieu of those required by (1)(a) through (g), if in good repair and presenting no observable hazards. The facility may not require the resident to provide these basic requirements as a condition of the resident's admission to the facility.~~

~~(3) (2) Following the discharge of a resident, all of the equipment and bedding used by that resident and owned by the facility must be cleaned and sanitized.~~

~~(4) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIII [37.106.2838] RESIDENT TOILETS AND BATHING (1) through (2) remain as proposed.

(3) Each resident room bathroom shall:

(a) be in a separate room with a toilet. and A sink, need not be in the bathroom but shall be in close proximity to the toilet. a A shower or tub is not required if the facility utilizes a central bathing unit or units; and

(b) through (6) remain as proposed.

(7) Each resident bathroom or bathing room shall have an a fixed emergency call system reporting to the staff location with an audible signal. The device device must be silenced at the location only and shall be accessible to an individual collapsed on the floor.

(8) Any provision of this rule may be waived at the discretion of the department if conditions in existence prior to the adoption of this rule or construction factors would make compliance extremely difficult or impossible and if the department determines that the level of safety to residents and staff is not diminished.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIV [37.106.2839] ENVIRONMENTAL CONTROL (1) through (2)(d) remain as proposed.

(3) Temperature in resident rooms, bathrooms, and common areas must be maintained at a minimum of 68EF and ~~the facility must give appropriate consideration to each resident's preferences regarding the temperature.~~

(4) through (5) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXV [37.106.2843] PERSONAL CARE SERVICES (1) through (2)(c)(xii) remain as proposed.

(3) In the event of accident or injury to a resident requiring emergency medical, dental or nursing care or, in the event of death, the personal care facility shall:

(a) remains as proposed.

(b) immediately notify the resident's practitioner physician and next of kin or responsible party.

(4) A resident shall receive skin care that meets the following standards:

(a) the facility shall practice preventive measures to identify those at risk and maintain a resident's skin integrity.

Risk factors include:

(i) skin redness lasting more than 30 minutes after pressure is relieved from a bony prominence, such as hips, heels, elbows or coccyx; and

(ii) malnutrition/dehydration, whether secondary to poor appetite or another disease process; and

(b) an area of broken or damaged skin must be reported within 24 hours to the resident's practitioner. Treatment must be as ordered by the resident's practitioner.

(5) A person with an open wound or having a pressure or stasis ulcer requiring treatment by a health care professional may not be admitted or permitted to remain in a category A facility.

(6) The facility shall ensure records of observations, treatments and progress notes are entered in the resident record and that services are in accordance with the resident health care plan.

(7) Direct care staff shall receive training related to maintenance of skin integrity and the prevention of pressure sores, by:

(a) keeping residents clean and dry;

(b) providing residents with clean and dry bed linens;

(c) keeping residents well hydrated;

(d) maintaining or restoring healthy nutrition; and

(e) keeping the resident physically active and avoiding the overuse of wheelchairs, sitting for long periods of time, and other sources of skin breakdown in ADL's.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXVII [37.106.2847] MEDICATIONS: PRACTITIONER ORDERS

~~(1) Written, signed practitioner orders shall be documented in all category B resident facility records by a legally authorized person for all medications and treatments which the facility is responsible to administer. Medication or treatment changes shall not be made without a practitioner's order. Order changes obtained by phone must be confirmed by written, signed orders within 21 days.~~

~~(2) (1) Medication and treatment orders shall be carried out as prescribed. The resident or the person legally authorized to make health care decisions for the resident has the right to consent to, or refuse medications and treatments. The practitioner shall be notified if a resident refuses consent to an order. Subsequent refusals to consent to an order shall be reported as required by the practitioner.~~

~~(3) remains as proposed but is renumbered (2).~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXVIII [37.106.2848] MEDICATIONS: ADMINISTRATION AND PREPARATION

~~(1) All category A facility residents must self-administer their medication. Those category B facility residents that are capable of, and who wish to self-administer medications, self-administration shall be encouraged by facility staff to do so.~~

~~(2) A Any direct care staff member who is capable of reading medication labels may ~~must~~ be made responsible for providing necessary assistance to any resident in taking their medication, as defined in ARM 37.106.2805. including:~~

~~(a) removing medication containers from secured storage;~~
~~(b) providing verbal suggestions, prompting, reminding, gesturing or providing a written guide for self administrating medications;~~

~~(c) handing a prefilled, labeled medication holder, labeled unit dose container, syringe or original marked, labeled container from the pharmacy or a medication organizer as described in [Rule XXVII] to the resident;~~

~~(d) opening the lid of the above container for the resident;~~

~~(e) guiding the hand of the resident to self-administer the medication;~~

~~(f) holding and assisting the resident in drinking fluid to assist in the swallowing of oral medications; and~~

~~(g) assisting with removal of a medication from a container for residents with a physical disability which prevents independence in the act.~~

~~(3) Only the following individuals may administer medications to residents:~~

~~(a) a licensed physician, physician's assistant, certified nurse practitioner, advance practice registered nurse~~

~~or a registered nurse;~~

~~(b) licensed practical nurse working under supervision;~~

~~(c) an unlicensed individual who is either employed by the facility or is working under third party contract with a resident or resident's legal representative and has been delegated the task under ARM Title 8, chapter 32, subchapter 17;~~

~~(d) a person related to the resident by blood or marriage or who has full guardianship.~~

~~(4) (3) Resident medication organizers may be prepared up to four weeks in advance and injectable medications as specified in (4)(c) up to seven days in advance by the following individuals:~~

~~(4)(a) through (4)(c) remain as proposed but are renumbered (3)(a) through (3)(c).~~

~~(5) (4) The individual referred to in (4) (3) must adhere to the following protocol:~~

~~(a) verify that all medications to be set up carry a practitioner's physician's current order;~~

~~(5)(b) remains as proposed but is renumbered (4)(b).~~

~~(c) set up injectable insulin medications up to seven days in advance by drawing insulin medication into syringes identified for content, date and resident. Other injectable medications must be set up according to the recommendations provided by the pharmacy.~~

~~(6) and (7) remain as proposed but are renumbered (5) and (6).~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXIX [37.106.2849] MEDICATIONS: RECORDS AND DOCUMENTATION

(1) An accurate medication record for each resident shall be kept of all medications, including over-the-counter medications, for those residents whose self-administration of medication requires monitoring and/or assistance administered by the facility staff to that resident.

(2) The record shall include:

(a) remains as proposed.

(b) name of the ~~primary care or prescribing physician or practitioner~~ and their telephone number;

(c) through (g) remain as proposed.

(h) initials of the person monitoring and/or assisting with self-administration of administering the medication and treatment at the time of self-administration; and

(i) remains as proposed.

(3) The facility shall maintain legible signatures of staff who monitor and/or assist with the self-administration of administer medication or treatment, either on the medication administration record or on a separate signature page.

(4) A medication record need not be kept for those residents for whom written authorization has been given by their ~~physician or practitioner~~ to keep their medication in their rooms and to be fully responsible for taking the medication in the correct dosage and at the proper time. The authorization

must be renewed on an annual basis.

(5) remains as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXX [37.106.2853] OXYGEN USE (1) A resident who requires the use of oxygen:

(a) through (3) remain as proposed.

(4) The following rules must be followed when oxygen is in use:

(a) oxygen tanks, ~~when used~~, must be secured and properly stored at all times;

(b) through (e) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXI [37.106.2855] INFECTION CONTROL (1) The personal care facility must establish and maintain infection control policies and procedures sufficient to provide a safe environment and to prevent the transmission of disease. Such policies and procedures must include, at a minimum, the following requirements:

(a) remains as proposed.

(b) if, after admission to the facility, a resident is suspected of having a communicable disease that would endanger the health and welfare of other residents, the administrator or designee, must contact the resident's practitioner physician and assure that appropriate safety measures are taken on behalf of that resident and the other residents; and

(c) and (2) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXII [37.106.2859] PETS (1) Unless the facility disallows it, residents in a personal care facility may keep household pets, as permitted by local ordinance, subject to the following provisions:

(a) and (b) remain as proposed.

(c) birds must be kept in appropriate enclosures, unless the bird is a companion breed maintained and supervised by the owner; and

(d) through (3) remain as proposed.

(4) Prior to admission of companion birds, documentation of the import, out-of-state veterinarian health certificate and import permit number provided by the pet store or breeder will be provided and maintained in the owners records. If the health certificate and import permit number is not available, or if the bird was bred in-state, a certificate from a veterinarian stating that the bird is disease free is required prior to residency. If the veterinarian certificate cannot be obtained by the move-in date the resident may keep the bird enclosed in a

private single occupancy room, using good hand washing after handling the bird and bird droppings until the veterinarian examination is obtained.

(4) remains as proposed but is renumbered (5).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXIII [37.106.2860] FOOD SERVICE (1) through (2) remain as proposed.

~~(3) Each meal shall include an alternate food or drink item from which the resident may choose.~~

~~(4) If a resident is unable to eat a meal or refuses to eat a meal, this must be documented in the resident's record if there is a medical reason or if it is otherwise appropriate.~~

~~(5) (3) Menus must be written at least one week in advance to guide cooks in selecting, purchasing, preparing and serving food. Records of menus as served and any substitutions actually served must be filed on the premises for three months after the date of service for review by the department.~~

~~(6) (4) A different lunch and dinner menu shall be planned and followed for each day of the week and shall not be repeated for two consecutive weeks. Adding variety to meals and resident preferences shall guide facility menu planning. The facility shall take into consideration the preferences of the residents and the need for variety when planning the menu. Either the current day or the current week's menu shall be posted for resident viewing.~~

(7) through (14) remain as proposed but are renumbered (5) through (12).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXIV [37.106.2861] LAUNDRY (1) remains as proposed.

(2) If a personal care facility processes its laundry on the premises it must:

~~(a) have a separate area used solely as a laundry, including a separate area used for sorting and processing soiled linen and storing clean linen and clothing. No laundry may be sorted or processed in a food preparation or dish washing area;~~

~~(b) (a) equip the laundry room with a mechanical washer and a dryer vented to the outside, hand washing facilities, a fresh air supply and a hot water supply system which supplies the washer with water of at least 110EF during each use;~~

~~(c) provide well-maintained covered laundry carts or tied laundry bags that are impervious to moisture to store and transport soiled laundry, keeping those used for soiled laundry separate from those used for clean laundry;~~

~~(d) (b) have ventilation in the sorting, holding and processing area that shall be adequate to prevent heat and odor build-up;~~

~~(e) (c) dry all bed linen, towels and wash cloths in a dryer; and~~

~~(f) protect clean laundry from sources of contamination while being transported, processed or stored; and~~

~~(g)~~ (d) ensure that facility staff handling laundry wash their hands both after working with soiled laundry and before they handle clean laundry.

(3) through (5) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXV [37.106.2862] HOUSEKEEPING (1) The following housekeeping rules must be followed:

(a) Supplies and equipment must be properly stored and ~~conveniently located~~ and must be on hand in a quantity sufficient to permit frequent cleaning of floors, walls, woodwork, windows and screens;

(b) and (c) remain as proposed.

(d) Garbage and trash must be stored for final disposal in areas separate from those used for preparation and storage of food and must be removed from the facility daily. Garbage containers must be kept clean ~~cleaned at least once a week~~.

(i) Containers used to store garbage in the kitchen and laundry room of the facility must be covered with a lid unless the containers are kept in an enclosed cupboard that is clean and prevents infestation by vermin. These containers shall be emptied daily and kept clean ~~sanitized weekly~~.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXVI [37.106.2865] PHYSICAL PLANT (1) through (8) remain as proposed.

(9) Any ~~surface or~~ structure such as a screen, half wall or planter which a resident could use for support while ambulating shall be securely anchored.

(10) through (15) remain as proposed.

~~(16) Fish ponds, hot tubs or spas, swimming pools or other bodies of water on the premises of the facility must be fenced, covered, locked or blocked in some other manner at all times when not being used by a resident.~~

(17) and (18) remain as proposed but are renumbered (16) and (17).

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XXXVIII [37.106.2872] REQUIREMENTS FOR CATEGORY B FACILITIES ONLY (1) through (1)(c) remain as proposed.

(2) A personal care B facility shall employ or contract with a registered nurse to provide or supervise nursing service to include:

(a) through (c) remain as proposed.

(d) routine nursing tasks, including those that may be delegated to licensed practical nurses (LPN) and unlicensed

unlicensed assistive personnel in accordance with the Montana Nurse Practice Act.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XL [37.106.2874] DIRECT CARE STAFF QUALIFICATIONS:
CATEGORY B (1) In addition to the requirements found in ARM 37.106.2816, each non professional staff providing direct care in a personal care B facility shall ~~have successfully completed and show current documentation of in-house training related to the care and services they are to provide under direct supervision of a registered nurse or supervising nursing service providing category B care, including those tasks that may be delegated to licensed practical nurses (LPN) and unlicensed assistive personnel in accordance with the Montana Nurse Practice Act. one of the following:~~

~~(a) a nurse aide training course approved by the Montana department of public health and human services certification bureau and shall have passed the Montana nurse aide competency examination;~~

~~(b) successfully challenged and passed the Montana nurse aide competency examination;~~

~~(c) be enrolled in an approved nurse aide training course with a completion within six months of hire; or~~

~~(d) be enrolled or have successfully completed other equivalent training programs as approved by the department.~~

~~(2) At least one person per shift shall hold a current CPR certificate.~~

(3) remains as proposed but is renumbered (2).

~~(4) (3)~~ Prior to providing direct care, direct care staff must:

~~(a) receive 16 hours of documented training and orientation specific to category B direct care requirements; or~~

~~(b) (a) work under direct supervision for any direct care task not yet trained or properly oriented; and~~

~~(c) (b) not take the place of the required certified person.~~

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLI [37.106.2875] RESIDENT HEALTH CARE PLAN:
CATEGORY B (1) through (2)(o) remain as proposed.

(3) A written resident health care plan shall be developed. The resident health care plan shall include, but not be limited to the following:

(a) a statement which informs the resident and the resident's practitioner physician, if applicable, of the requirements of 50-5-226(3) and (4), MCA.

(b) through (4) remain as proposed.

(5) The health care plan shall be readily available to and followed by those all staff and licensed health care professionals providing the services and health care.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLIII [37.106.2879] INCONTINENCE CARE: CATEGORY B (1) through (2)(d) remain as proposed.

(3) Indwelling catheters are permissible, if the catheter care is taught and supervised by a licensed health care professional under a practitioner's physician's order. Observations and care must be documented.

(4) through (4)(b) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLV [37.106.2884] SEVERE COGNITIVE IMPAIRMENT: CATEGORY B (1) through (3) remain as proposed.

(4) Direct care staff must receive additional ~~be, at a minimum, a certified nurse assistant with additional~~ documented training in:

(a) through (6) remain as proposed.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLVI [37.106.2885] ADMINISTRATION OF MEDICATIONS: CATEGORY B (1) Written, signed practitioner orders shall be documented in all category B resident facility records by a legally authorized person for all medications and treatments which the facility is responsible to administer. Medication or treatment changes shall not be made without a practitioner's order. Order changes obtained by phone must be confirmed by written, signed orders within 21 days.

(1) remains as proposed but is renumbered (2).

~~(2)~~ (3) Residents with a standing PRN medication order, that cannot determine their own need for the medication by making and make a request to self-administer the medication or in the case of the cognitively impaired cannot respond to caretaker's suggestions for over-the-counter PRN pain medications shall:

(2)(a) and (2)(b) remain as proposed but are renumbered (3)(a) and (3)(b).

(4) Medication and treatment orders shall be carried out as prescribed. The resident or the person legally authorized to make health care decisions for the resident has the right to consent to or refuse medications and treatments. The practitioner shall be notified if a resident refuses consent to an order. Subsequent refusals to consent to an order shall be reported as required by the practitioner.

(5) Only the following individuals may administer medications to residents:

(a) a licensed physician, physician's assistant, certified nurse practitioner, advanced practice registered nurse or a registered nurse;

(b) licensed practical nurse working under supervision;

(c) an unlicensed individual who is either employed by the facility or is working under third party contract with a resident or resident's legal representative and has been delegated the task under ARM Title 8, chapter 32, subchapter 17; and

(d) a person related to the resident by blood or marriage or who has full guardianship.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

5. In response to and at the request of commentary received, the Department is adopting these additional rules.

RULE XLVII [37.106.2854] USE OF RESTRAINTS, SAFETY DEVICES, ASSISTIVE DEVICES, AND POSTURAL SUPPORTS (1) The facility shall comply with the rules governing the use of restraints, safety devices, assistive devices and postural supports in long term care facilities. The provisions of ARM 37.106.2901, 37.106.2902, 37.106.2904, 37.106.2905 and 37.106.2908 shall apply.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA

IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

RULE XLVIII [37.106.2886] MEDICATIONS: RECORDS AND DOCUMENTATION: CATEGORY B (1) An accurate medication record for each resident shall be kept of all medications, including over-the-counter medications, administered by the facility to that resident.

(2) The record shall include:

(a) name of medication, reason for use, dosage, route and date and time given;

(b) name of the prescribing practitioner and their telephone number;

(c) any adverse reaction, unexpected effects of medication or medication error, which must also be reported to the resident's practitioner;

(d) allergies and sensitivities, if any;

(e) resident specific parameters and instructions for PRN medications;

(f) documentation of treatments with resident specific parameters;

(g) documentation of doses missed or refused by resident and why; and

(h) initials of the person administering the medication and treatment at the time of administration.

(3) The facility shall maintain legible signatures of staff who administer medication or treatment, either on the medication administration record or on a separate signature page.

(4) A medication record need not be kept for those residents for whom written authorization has been given by their physician or practitioner to keep their medication in their

rooms and to be fully responsible for taking the medication in the correct dosage and at the proper time. The authorization must be renewed on an annual basis.

(5) The facility shall maintain a record of all destroyed or returned medications in the resident's record or closed resident file in the case of resident transfer or discharge.

AUTH: Sec. 50-5-103, 50-5-226 and 50-5-227, MCA
IMP: Sec. 50-5-225, 50-5-226 and 50-5-227, MCA

6. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

Rule II (ARM 37.106.2802)

COMMENT #1: The language after the first sentence in Rule II(1) (ARM 37.106.2802) should be deleted. The language after the first sentence appears to be defining what personal care is and describes the purpose of personal care rather than the purpose of the rules.

RESPONSE: The department disagrees. This language is necessary to describe what personal care is and provides context for the rules which follow.

Rule V (ARM 37.106.2805)

COMMENT #2: The definition of the administrator in (2) should be changed to read that this is "the individual responsible for management of the facility". It is important to distinguish between the owner who is responsible for the policies and care and the administrator who manages based on the established policies.

RESPONSE: The department disagrees. The administrator must take responsibility for daily care in the facility. This is the person staff and residents look to for decisions on how care will be provided. The owner may or may not be involved in the day to day operation of the facility.

COMMENT #3: The department may wish to include a definition of governing body and include a provision that facilities designate a governing body or persons functioning as a governing body that is legally responsible for establishing and implementing policies regarding the management and operation of the facility.

RESPONSE: The department disagrees. The decision to utilize or not utilize a governing body is an individual facility decision. We find no compelling public safety interest that would necessitate the use of a governing board.

COMMENT #4: In Rule V(3) (ARM 37.106.2805), the department should insert specific references to said laws as was done in

Rule V(15) (ARM 37.106.2805).

RESPONSE: The Department disagrees. The definition of "advance directive" provided at Rule V(3) (ARM 37.106.2805) is modeled after the definition of "advance directive" located at 42 CFR 489.100, which is applicable to Montana personal care facilities (by reference) pursuant to 50-5-1104(1), MCA, and is intentionally not limited to a specific statutory scheme. A written instruction relating to the provision of healthcare when a person becomes incapacitated need not be recognized in statute in order to qualify as an "advance directive", but may also qualify if recognized in the common law or by the courts of the state of Montana.

COMMENT #5: Language should be added to Rule V(4) (ARM 37.106.2805(4)) to include as ambulatory those individuals who can laterally evacuate to the next compartment or safe area.

RESPONSE: The department disagrees. The department's definition more accurately describes an ambulatory person.

COMMENT #6: The words "at least 18 years of age" should be removed from the definition of direct care staff Rule V(8) (ARM 37.106.2805(8)). This places an unnecessary barrier of who may be employed beyond what is already covered in wage and hour laws.

RESPONSE: The department agrees. This term has been removed.

COMMENT #7: The term health care service in Rule V(10) (ARM 37.106.2805) should not pertain to just category B residents. It should pertain to all individuals. Category A residents may need temporary health care services provided by a health care professional at times.

RESPONSE: The department concurs and has made the appropriate change.

COMMENT #8: The requirement at Rule V(13) (ARM 37.106.2805) for licensed health care professional should be expanded to include licensed professional nurses (LPNs) acting within the scope of their practice.

RESPONSE: The department is unable to comply with this request because licensed practical nurses (LPNs) may not work independently in a personal care facility.

COMMENT #9: The requirement at Rule V(13) (ARM 37.106.2805) for licensed health care professional should be expanded to include mental health professionals.

RESPONSE: The department does not feel that the addition of a mental health professional to this definition is appropriate because many of the tasks outlined in the rules relate to

physical health assessment. We do believe that an assessment of mental status by a mental health professional in many instances is desirable.

COMMENT #10: In Rule V(13) (ARM 37.106.2805) strike "nurse practitioner" and insert "advanced practice registered nurse". This is a more correct term.

RESPONSE: The department concurs and has made the suggested change.

COMMENT #11: Rule V(13) (ARM 37.106.2805) is a carry over from the present rules, Rule V(13)(a) (ARM 37.106.2805). Doctors, physician assistants, etc. will not come to a small, non-skilled nursing facility and those who will, such as a county nurse, do not know the residents well enough to assume the risk of making such a certification.

RESPONSE: The section that is being referenced is Rule V(22) (ARM 37.106.2805) not Rule V(13) (ARM 37.106.2805). The issue raised is outside the scope of this rulemaking. The enabling legislation for these rules is 50-5-226(4), MCA. This code specifies that this assessment must be made.

COMMENT #12: Include the term "custodial care" as part of the definition for personal care in Rule V(16) (ARM 37.106.2805). Insurance companies frequently use the term custodial care for reimbursement issues and will not pay if regulations only use the words "assisted living" or "personal care" even if the words have the same meaning.

RESPONSE: The definition of "personal care" is set in statute at 50-5-101(38), MCA, and the Department may not provide by administrative rule a broader definition than that which is set in statute.

COMMENT #13: The definition of Rule V(17) (ARM 37.106.2805) personal care facility seems to indicate that you are only a personal care facility if you are licensed as such. This differs from the statute at 50-5-101(39), MCA. This definition should be changed to conform with the statute.

RESPONSE: The department agrees and we have made the appropriate modification.

COMMENT #14: The definition of "resident" in Rule V(20) (ARM 37.106.2805) seems to indicate that an individual residing in a personal care facility is not a resident unless a contract is in place. A contract should not be required. The rules should set out minimum standards for disclosure of key information to consumers as outlined in statute but should not describe the specific vehicle or document for providing the notice. The words "through contractual agreement" should be removed.

RESPONSE: The department concurs that this phrase is extraneous to the definition and has removed it.

COMMENT #15: The department should remove the definition of "resident agreement" Rule V(21) (ARM 37.106.2805). The rules should set out the minimum standards for disclosure of key information but should not describe the specific vehicle or document for providing the notice.

RESPONSE: The department disagrees. The department believes that written disclosure which includes the items listed in the definition is necessary. The facility may use any form it wishes for this written disclosure so a specific vehicle or document has not been specified. Written disclosure guarantees that residents or their legal representatives are given all of the information listed. Residents and their families often complain that full disclosure was not made.

COMMENT #16: The language in Rule V(23) (ARM 37.106.2805) is unclear as to whether the facility must provide these services or assist the resident in locating and procuring services.

RESPONSE: The department agrees that the language is unclear and has made appropriate modifications to the definition. The facility may either directly provide the services or assist the resident in locating services.

COMMENT #17: Service coordination, Rule V(23) (ARM 37.106.2805), is not a required service under the statute. Financial assistance and management and spiritual services are especially troublesome. This section should be changed to clarify whether the facility must provide the services or make provisions for the services.

RESPONSE: The facility may either directly provide the services or assist the resident in locating services. Service coordination is an important part of resident care and the department believes it has the statutory authority to require this coordination.

COMMENT #18: Service plan, Rule V(24) (ARM 37.106.2805), should be changed to set out minimum standards for determining the services to be received by each resident. These rules should not prescribe a specific document to embody the agreement and decisions.

RESPONSE: The department has not prescribed a specific document that must be used. Services to be provided to each resident must be individually assessed based on the resident's need and desire for care. This definition recognizes the need for individualized care. Since the respondent offered no suggestions for minimum standards, the department is unable to infer what is meant by the suggestion.

COMMENT #19: Rule V(24) (ARM 37.106.2805) should specify that the service plan be reviewed and updated at least annually.

RESPONSE: The department agrees and has made the appropriate change.

COMMENT #20: The term "significant change" in Rule V(24) (ARM 37.106.2805) should be removed and replaced with an outcome-based approach such as "when necessary". If it is not removed, it should be defined.

RESPONSE: The department disagrees. The term "when necessary" is much more open to interpretation and the department fails to understand what is "outcome-based" about the term. The dictionary may be consulted to determine the meaning of "significant" and "change". It is not possible to adequately define this for every personal care facility resident in this rule. An inability to walk a block without resting may be a significant change for a hereto active resident and may be unremarkable in another.

COMMENT #21: The term "significant other" in Rule V(24) (ARM 37.106.2805) should be removed. It is not found anywhere in Montana law and raises issues about those legally authorized to be involved in health care decisions and to receive personal health care information.

RESPONSE: The department concurs and has removed the phrase.

COMMENT #22: Must a resident be considered to have a severe cognitive impairment if they exhibit only one, all, or a number in-between of the functions listed in Rule V(25) (ARM 37.106.2805)?

RESPONSE: As indicated in the definition by the use of the word "and/or", a resident who exhibits any one of the listed conditions/symptoms is considered to have a severe cognitive impairment.

COMMENT #23: The definition of "third party services" in Rule V(27) (ARM 37.106.2805) should be changed to reflect that a third party may be entities or companies, not just individuals. We are also not sure that the term "no fiduciary interest" captures the intent of the statute that the service should be provided by someone at arms length from the facility.

RESPONSE: The department has added language to clarify that a third party may be other than an individual. The department believes that the term "no fiduciary interest" complies with the intent of the statute.

COMMENT #24: There needs to be further definitions for the administration of medication and assisting with self-administration. The medication area has been very confusing to

providers and there has not been consistency between the Board of Nursing, Board of Pharmacy and DPHHS.

RESPONSE: The department concurs and has added a definition of self-administration and clarified the appropriate rules.

Rule VIII (ARM 37.106.2814)

COMMENT #25: I understand and even welcome some of the new regulations. Some of the new regulations I look forward to are ALFA Administrator Certification and continuing education credits for the Administrator of an Assisted Living facility. Also, it is a good idea to train people for the medication reminder system under the guidelines of the Board of Nursing.

RESPONSE: The department appreciates your support.

COMMENT #26: The responsibility for "managing" the facility should be attached to the "facility" and not to the "administrator" with a differentiation between the "manager" of the facility and the owners or governing body. Rule VIII(5) through (10) (ARM 37.106.2814) should be assigned as responsibilities to the "facility" rather than to the "administrator".

RESPONSE: The department believes that responsibility for assurance of safe management is more appropriately assigned to an individual rather than a corporate entity. It is unrealistic to expect an owner or governing body of a facility who is never actually present at the facility, and who may be located outside of the state, to monitor the daily operations of the facility, and to ensure the safety of facility residents on a 24 hour-a-day basis. While the owner or governing body may certainly set policies and rules which must be followed by the administrator, it is necessary to hold accountable for the safety of the residents, a person who is actually present at the facility.

COMMENT #27: The department should set out general qualifications that include education, training or experience or a combination of education, training and experience designed to assure that those functioning as administrators have basic knowledge and skills. "Just because a person doesn't have an RN behind his or her name does not mean they are not qualified to own and/or run a care home. I certainly don't think they should have to have an administrators license".

RESPONSE: The department believes that establishing an expectation that administrators possess core training and knowledge of the elements of assisted living care is essential to assure protection of the safety and physical, mental and emotional health of residents.

The department agrees that the listing of topics acceptable for continuing education is too prescriptive and will modify the

rule to reflect the recommendation.

COMMENT #28: Rule VIII(3) (ARM 37.106.2814) should be deleted as responsibilities of the administrator. These are "facility" obligations and not necessarily the direct responsibility of the administrator.

RESPONSE: The department believes that the responsibilities set forth in the rule are core to the assurance of the protection of the safety and physical, mental and emotional health of residents in the assisted living facility and that these responsibilities are appropriately assigned to an individual, i.e. the administrator as an option for direct assignment or by delegation rather than to a corporation or governing body.

COMMENT #29: Regarding Rule VIII(6) (ARM 37.106.2814), the department should take into account that the facility may be dealing with a competent resident.

RESPONSE: The department agrees and has revised the rule to include input from a competent resident.

COMMENT #30: Regarding Rule VIII(10) (ARM 37.106.2814), incident reports should not be required or included in this part of the rules. The department should focus on the provider's development of standards for investigating and taking appropriate steps to safeguard residents.

RESPONSE: The department does believe that this section of the rule is important to prevent further accidents/incidents. The facility is free to choose what tool they will use to document their preventive actions. Incident reports are never mentioned in the rule. The department has expanded Rule XVII(2)(f) (ARM 37.106.2829) to include safety measures taken in response to a significant event.

COMMENT #31: The department should recognize and accept Nursing Home Administrator licenses received from other states. Current assisted living facility administrators should be "grandfathered" and "be recognized as administrators by the department".

RESPONSE: The department agrees that the state should recognize and accept proof of current nursing home administrators licenses received from other states, and has amended the rule to reflect this change. The department disagrees that current administrators who cannot provide proof of either nursing home administration license or of successful completion of ALFA be grandfathered in, as department experience has found that years of experience do not necessarily equate into administrative understanding of the responsibilities in assuring that the needs of all residents are met.

COMMENT #32: The department should make some rules such as Rule
Montana Administrative Register

VII (ARM 37.106.2810) subject to the size of the facility.

RESPONSE: The department believes that core training and knowledge for an administrator is essential in assuring the protection of the safety and physical, mental and emotional health of residents regardless of the facility size.

COMMENT #33: It was recommended that the department clarify the difference between the owner and an administrator and to clarify the qualifications of the "designee".

RESPONSE: The department believes that the differences between the owner and the administrator are clarified in the rule which sets forth the responsibilities of the administrator. The department agrees that the qualifications of the "designee" are unclear, and has amended the rule to provide the requested clarification.

COMMENT #34: The increase in annual hours of training seems extreme. Recommend 8 to 12 hours annually.

RESPONSE: The department believes that the number of hours of annual training is appropriate.

Rule IX (ARM 37.106.2815)

COMMENT #35: Rule IX (ARM 37.106.2815) on policy and procedures is a true demonstration of over-regulation.

RESPONSE: The department agrees that the rule on policy and procedure is too prescriptive and is redundant to the text of the proposed administrative rules. The department has amended it accordingly.

COMMENT #36: Each facility's Policy and Procedure manual should not be available as a public document open to anyone's review.

RESPONSE: The department believes that the facility has a responsibility to the residents and to family members or legal representatives for accountability in their procedures and practices. This accountability is set forth in the facility policy and procedure manual.

Rule X (ARM 37.106.2816)

COMMENT #37: Reading an entire policy and procedure manual is not relevant to assuring good practice for all staff and volunteers. This requirement should be struck or significantly amended.

RESPONSE: The department agrees and has amended the rule to so provide.

COMMENT #38: Rule X (ARM 37.106.2816) should apply to the

facility's obligation not the administrators.

RESPONSE: The department believes that responsibility for assuring that staff does not pose a risk or threat to the health, safety or welfare of residents is appropriately assigned to an individual rather than a corporate entity.

COMMENT #39: Is this a requirement for criminal background checks? For confidentiality and other reasons, different facilities configure their employee files differently. The rules should not tell the facility where to keep the information regarding employee screening.

RESPONSE: The department believes it is essential for an employer to establish minimum qualifications for staff and to assure that prospective and current employees have the capability to meet the needs of residents in a safe and prudent manner. The department believes it is reasonable to request that the facility maintain screening documentation in the individual employee's file.

COMMENT #40: Rule X(2) (ARM 37.106.2816) lists 21 separate subjects for employee orientation. It is too prescriptive and is process oriented. It should be changed to require orientation appropriate to assure that each direct care staff member is able to competently provide care and services to the facility's residents. The need for staff orientation will vary depending on the size of the facility, the type of resident being cared for, and the job description of the care giver.

RESPONSE: The department concurs. Rule X(2) (ARM 37.106.2816) has been revised to make it more understandable.

COMMENT #41: Rule X(2)(o) (ARM 37.106.2816) refers to CPR as though it is required while Rule X(3) (ARM 37.106.2816) clarifies that the facility may choose to provide CPR.

RESPONSE: The department agrees that the reference to CPR in both Rule X(2) and (3) (ARM 37.106.2816) is confusing. It has been struck from Rule X(2)(o) (ARM 37.106.2816).

COMMENT #42: Rule X(2) (ARM 37.106.2816) specifies that training will include emergency procedures for first aid and CPR. Rule X(3) (ARM 37.106.2816) specifies that only one person per shift is required to be trained in the Heimlich maneuver. The Heimlich maneuver is included in basic first aid training so all staff has met this requirement and Rule X(3) (ARM 37.106.2816) makes no sense.

RESPONSE: The department agrees that these two sections are confusing. The reference to basic first aid training will be struck in Rule X(2) (ARM 37.106.2816) and language will be added to Rule X(3) (ARM 37.106.2816) to clarify the department's intent that all staff should be trained in the Heimlich maneuver

and basic first aid. The proposed changes to CPR are outlined in the response to Comment #41 above.

COMMENT #43: Strike the language in Rule X(3) (ARM 37.106.2816) "if the facility offers CPR". Unless the facility only admits clients who have a "do not resuscitate" status, at least one person per shift certified in CPR should be on duty at all times.

RESPONSE: The department will leave the decision of whether to provide or not provide CPR to the facility. This policy must be disclosed to the resident in the admission agreement.

COMMENT #44: Everyone should be CPR certified. There is no other way to guarantee that there will always be someone on duty that is CPR certified.

RESPONSE: The department will leave it to the facility to assure that if they offer CPR at least one staff is on duty who is certified to administer it.

COMMENT #45: If a licensed health care professional is on duty, must they also hold a current CPR certificate? This seems a bit much if so, as ER MDs and RNs are not required to hold such certification.

RESPONSE: The department will leave it to the facility to assure that if they offer CPR at least one staff is on duty who is certified to administer it. If the only staff on duty is a licensed health care professional then that person must be certified in CPR. Most, if not all, hospitals require their staff to be certified in CPR.

COMMENT #46: The training requirements for basic first aid and CPR are excessive and increase cost to providers. Will the department interpret this to mean Red Cross certified classes? Again, the focus is on paper compliance rather than outcome oriented.

RESPONSE: The department is not requiring a specific course. The department does not believe that all licensure requirements can be or should be outcome oriented. These are two very good examples where failure to properly train staff can result in the death of the resident. If a resident bleeds to death because staff is not taught to apply direct pressure to a pumping artery or is unable to perform the Heimlich maneuver on a resident who has choked on a piece of meat, it will be scant comfort to the resident or their family that they had a bad "outcome" and the facility's license may subsequently be suspended or revoked. The safety of residents demands that basic standards to protect the safety of residents be required.

COMMENT #47: Make some rules, such as Rule X(3) (ARM 37.106.2816) subject to the size of the facility.

RESPONSE: The department is charged with assuring the safety of residents in personal care facilities regardless of the size of the facility.

COMMENT #48: Rule X(4)(a) and (b) (ARM 37.106.2816) are good examples of outcome oriented approaches and we support these rules.

RESPONSE: The department appreciates the support.

COMMENT #49: Rule X(4)(e) (ARM 37.106.2816) does not consider that direct care staff may include licensed individuals.

RESPONSE: The department concurs and has modified this subsection to clarify that staff may not perform duties which they are not licensed to perform.

COMMENT #50: Rule X(5) and (6) (ARM 37.106.2816) should be deleted or changed to remove the restrictions on what volunteers can do and the requirement that volunteers have the same orientation and training as direct care staff.

RESPONSE: The Department does agree that a volunteer should only have to be trained for services they will actually be performing. Rule X(6)(a) (ARM 37.106.2816) will be modified to reflect this change. The department believes that the tasks outlined in (6)(b) are not appropriate to be performed by a volunteer even with orientation.

COMMENT #51: In Rule X(2)(m) (ARM 37.106.2816), the ability to discern adverse and desired medication reactions or actions is within the scope of skilled nursing. Within the personal care facility, it is not possible to train personal care staff (who possess only basic medical skills) to determine the adverse and desired medications reactions or actions to hundreds of medications and/or combinations of medications taken by our residents. It would appear that (4)(e) would support this concern "facility staff may not perform any health care service that has not been appropriately delegated under the Montana Nurse Practice Act or is restricted to performance by licensed health care professionals".

RESPONSE: The department agrees and has revised the rule.

Rule XI (ARM 37.106.2817)

COMMENT #52: This rule should be changed to specify those limited pieces of employee information that must be available to the department and to take out prescriptive language defining facilities' personnel files. Rule XI(2) (ARM 37.106.2817) is redundant with section (3).

RESPONSE: The department has revised the rule to reflect the requested change.

COMMENT #53: The rules talk about making Employee Personal files available to the department at all reasonable times.

RESPONSE: The rules do not require that employee personal files be available to the department, but rather employee files. The department has the right to request information which assures a provider's compliance with the administrative rules. The department has revised the rule to clarify which items it requires.

COMMENT #54: Must records be maintained after employment is terminated? If so, how long?

RESPONSE: The department does not have a requirement for facilities to maintain the records of terminated employees.

Rule XII (ARM 37.106.2821)

COMMENT #55: Rule XII (ARM 37.106.2821) requires information in the application that the facility does not need unless the person is accepted for admission. This is an application, not a "Move-in". Residents are not even required to have a practitioner.

RESPONSE: The department concurs that Rule XII(1)(b) and (c) (ARM 37.106.2821) are criteria that are required when the resident is admitted to the facility and has moved this criteria to Rule XIII (ARM 37.106.2822) pertaining to the Resident Service Plan with the qualifier "if applicable" added when requesting practitioner information.

COMMENT #56: Rule XII (ARM 37.106.2821) requires an initial screening and focuses on paper compliance rather than ensuring that the facility utilizes a procedure for screening residents. The prescriptive requirements detailing all the information to be used in the screening tool is unrealistic and too private, crossing the line of privacy, and should not be demanded until it is needed. We recommend removal or clarification of Rule XII(5)(a) (ARM 37.106.2821) to take into account a resident's right not to share medical and psychological issues.

RESPONSE: In order to determine if the facility can meet the needs of a resident, an assessment to screen the resident's physical, emotional, and psychological needs is crucial. The basic framework is provided in this rule. This information is the foundation for the resident's individualized service plan and provides a guide for the resident's care. This process is the first step in building a working relationship with the resident, resident's family, and responsible parties by providing a sense of belonging and competency in meeting resident needs. Likewise, this process may assist residents, family members, and responsible parties in accepting the limitation of Assisted Living and provide discussion and/or planning for a Skilled Nursing Facility admission, if

appropriate.

The department has modified Rule XII(5) (ARM 37.106.2821) to comply with the Assisted Living Federation of America (ALFA) Resident Needs Assessment form found on pages 13-19 of Module 3 of The Management Library of Administrators and Executive Directors Training System which the department has accepted in Rule VIII(b) (ARM 37.106.2814) as a standard of practice. The term "screening" is replaced with "resident needs assessment" for consistency and clarification of expectations and purpose.

The ALFA Resident Needs Assessment form, modified to current rules, is included in sample forms offered to facility Administrators/Managers (as directed by SB 420 codified as 2001 Laws of Montana Chapter 331) over the past seven months. Facility administrators and managers have responded favorably to the Resident Needs Assessment Form. Facilities may continue to use forms and tools already in place that meet the Move-In criteria, and/or add individual preferences and special services unique to the individual facility and resident.

The rule also provides a process for appealing a rejection or relocation. An independent nurse assigned by the Department to assess the resident will apply the same criteria to establish the needs of the resident.

Providers report insurance companies denying coverage due to the lack of defined ADL's and services. Providing criteria details are included to address this issue for providers.

The objective of a screening procedure implemented through a resident's needs assessment is to focus documentation in an organized and consistent manner; reducing the amount of "paper compliance" while ensuring resident services are appropriate and understood by all parties.

COMMENT #57: Rule XII(6) (ARM 37.106.2821) requires review and modification of the initial service plan in 60 days, which is not part of an application.

RESPONSE: The department agrees and has moved this section to Rule XIII (ARM 37.106.2822). Other states require a 30-day review, but 60 days allows the resident ample time to adjust to the move-in process.

RULE XIII (ARM 37.106.2822)

COMMENT #58: This rule prescribes a certain document detailing services and who will provide them. It is too prescriptive. It resembles the skilled nursing facility model.

RESPONSE: The resident service plan is the outcome of the resident needs assessment and is included in the Rule XIV(1)(c) (ARM 37.106.2823) (see comments/responses under subheading Rule

XIV (ARM 37.106.2823)). The complexity of the service plan is based upon the needs of the resident. The resident service plan may be limited to only one service; such as a medication reminder, or be all inclusive for the more dependant category A resident. The resident service plan can also be used as a tool for providers to determine staffing hours and service charges based upon residents' needs. There are formulas, internet services and computer software programs available which provide additional support in developing these tools for resident services. The Department or ALFA can be contacted for further information on a variety of systems available.

COMMENT #59: As written this rule would increase the petty, trivial paper-orientated deficiencies that typify the current survey process.

RESPONSE: The rule is based upon the outcome of the resident's needs assessment in Rule XII (ARM 37.106.2821). Once the resident's needs are determined, a plan to provide services to meet these needs is developed with the resident, resident's family and responsible persons. This plan is then incorporated into the resident agreement. The step-by-step process is provided in ALFA's Module 3 of The Management Library of Administrators and Executive Directors Training System. According to ALFA the service plan is another way to connect with the resident, family members and staff in developing a community setting. Residents are key decision makers in developing the service plan. By encouraging the resident to exercise their freedom of choice, you give them a sense of control and involvement.

COMMENT #60: In Rule XIII(3) (ARM 37.106.2822) change the sentence to read "The service plan shall be reviewed annually and updated as needed."

RESPONSE: The rule has been modified to include resident needs assessment and service plan review or modification annually and any time the resident's needs change significantly.

COMMENT #61: I would like to see the wording changed to: "A copy of the resident service plan shall be offered to the resident or resident's legal representative and be made part of the resident file." Many times the residents will say they don't need a copy of the service plan.

RESPONSE: The service plan is included in the modified resident agreement (see comments/responses under subheading Rule XIV (ARM 37.106.2823)). When the resident or resident's representative refuses to accept a copy of the service plan it is recommended to document that the copy of the service plan provided was refused. Should problems occur later, the records will indicate that the information was given and refused.

COMMENT #62: The order of Rule XIII(2)(a) and (b) (ARM

37.106.2822) should be reversed.

RESPONSE: The department agrees and has reversed the order.

COMMENT #63: Residents' health care needs for category B should be included as part of any service plan.

RESPONSE: The department believes each category B resident has special needs and acuity. The health care plan may include licensed health care professional assessment and development while the service plan may not. There may be cases where the health care plan can be incorporated into the service plan and there may be other cases where services provided by the facility are separate from care provided by the licensed health care professional. This is addressed specifically in Rule XXXVIII(2)(c) (ARM 37.106.2872).

RULE XIV (ARM 37.106.2823)

COMMENT #64: The only sections and subsections of this rule that are specifically authorized by statute are Rule XIV(1)(a), (b) and (c) (ARM 37.106.2823).

RESPONSE: The department disagrees. Rule XIV(1)(d) through (h) (ARM 37.106.2823) define agreement contents that have historically been omitted from resident agreements. These omissions have created many hardships upon residents, families, and facility administrators and managers. By addressing the criteria in a resident agreement the move-in and move-out criteria, expectations, and procedures are clearly identified and addressed prior to signing the agreement. This rule is written to protect all parties from misrepresentation and legal disputes that can create financial and emotional burdens on all concerned.

COMMENT #65: The resident/provider agreement is generally a document that is signed upon move-in and generally includes how we will notify changes to services and fees. Rule will require hours of staff time and reams of documentation.

RESPONSE: The department disagrees. Once the facility addresses the topics identified in Rule XIV(1)(a) through (h) (ARM 37.106.2823) in the formal agreement, both the resident and provider will have a clear understanding of expectations and roles. The rule will initially require re-addressing the resident agreement used by providers. However, once established, the only criteria requiring adjustments will be the specific resident service plan detailed in Rule XIII (ARM 37.106.2822). By incorporating resident needs assessment with the resident service plan the amount of documentation will be limited to the following process: the resident needs assessment which determines the resident service plan (and with category B the resident health care plan) which becomes the new resident/provider agreement attached to the basic facility

agreement defined in Rule XIV (ARM 37.106.2823).

Implementation of the step-by-step move-in and move-out process structure provided in Rules XII (ARM 37.106.2821), XIII (ARM 37.106.2822) and XIV (ARM 37.106.2823) will result in structured focused resident agreements and resident records. Rule XIV(1)(c) (ARM 37.106.2823) is modified to read "the extent that specific assistance will be provided by the facility as specified in the resident's service plan" replacing "to the resident with the activities of daily living" to clarify this process of incorporation. The department expects a decrease in paperwork, deficiencies and complaints.

Rule XV (ARM 37.106.2824)

COMMENT #66: Change "and" to "and/or" in Rule XV(1)(b) (ARM 37.106.2824). The new language would read "...behaviors or actions that repeatedly and/or substantially interferes...".

RESPONSE: No change was made because the department believes that an isolated action or behavior does not constitute grounds for the involuntary discharge of a resident. Both factors must be present.

COMMENT #67: Rule XV(2) (ARM 37.106.2824) proceeds to completely negate the other sections and leaves the consumers with absolutely no protection. Discharge could be made for any reason at the discretion of the facility. This is in direct conflict with resident rights established in Rule XVI (ARM 37.106.2828).

RESPONSE: The department agrees and has moved Rule XV(2)(a) to (1) (ARM 37.106.2824) and has added language clarifying that the resident has failed to pay charges after reasonable and appropriate notice. The rest of Rule XV(2) (ARM 37.106.2824) has been deleted in its entirety.

COMMENT #68: The rule makes no exception to the notice requirement when a facility can't meet the residents' needs. Facilities should not be required to keep residents if their condition has changed to a point where appropriate care cannot be provided.

RESPONSE: The department disagrees. Rule XV(4) (ARM 37.106.2824) specifies the circumstances under which a resident may be discharged in less than 30 days. These include when the resident has a medical emergency or exhibits behaviors that pose an immediate danger to self or others.

COMMENT #69: Involuntary discharge criteria and rights for personal care residents are outlined in 50-5-1101, et seq., MCA and in federal law that is referenced. Rule XV (ARM 37.106.2824) is confusing and appears to conflict with applicable statutes. It should be deleted because the subject

matter is fully defined by law.

RESPONSE: The department disagrees that Rule XV (ARM 37.106.2824) should be deleted. The circumstances under which a resident may be involuntarily discharged is an area that residents, personal care facilities, LTC ombudsman, and licensure staff have expressed difficulty understanding and interpreting. This rule seeks to provide further clarification of federal and state law in an understandable format. Rule XV (ARM 37.106.2824) also specifies a resident's rights for appeal of an involuntary discharge.

COMMENT #70: Rule XV(3)(c) (ARM 37.106.2824) which specifies that the move-out notice specify the location to which the resident is to be transferred or discharged should be deleted. Personal care promotes choice and autonomy. The facility may assist the resident to find a new home but the choice is ultimately the residents.

RESPONSE: This requirement is specified in the federal regulations (42 CFR 483.12) which are applicable to Montana personal care facilities pursuant to 50-5-1104(1), MCA. The requirement is included in this rule because some facilities have been unaware of this requirement in the past and have not given residents adequate discharge notices.

COMMENT #71: Rule XV(5)(a) (ARM 37.106.2824) should be deleted as this definition is already given in Rule V(11) (ARM 37.106.2805).

RESPONSE: The department agrees that it is unnecessary to have the definition in two different rules. Department policy is to place all definitions in one rule to make it easy to look up definitions. However, because the definition is integral to the meaning of Rule XV (ARM 37.106.2824) the Department is opting to leave a direct reference to the definitions rule to reflect that there is a specific definition for involuntary transfer or discharge.

Rule XVI (ARM 37.106.2828)

COMMENT #72: This rule should be deleted because it is simply repeating legal requirements covered by other state and federal laws and regulations. The department may wish to retain a sentence requiring assisted living facilities to comply with the provisions of the resident rights act, the rights of the terminally ill act, etc.

RESPONSE: The department disagrees that Rule XVI (ARM 37.106.2828) should be deleted. Resident rights are an area that residents, personal care facilities, LTC ombudsman, and licensure staff have expressed difficulty understanding and interpreting. This rule seeks to provide further clarification of federal and state law in an understandable format. Rule XVI

(ARM 37.106.2828) also specifies a resident's rights in regards to advance directives.

COMMENT #73: Current rules require posting of resident rights. Was this requirement deliberately deleted?

RESPONSE: The requirement to post the resident rights is contained in the "Montana Long-Term Care Residents' Bill of Rights" that was referenced in previous rules as well as in this proposed rule. A statement about the posting requirement has been added to Rule XVI (ARM 37.106.2828).

Rule XVII (ARM 37.106.2829)

COMMENT #74: The annual weight requirement for Level A residents should be deleted.

RESPONSE: The department believes that a baseline and annual weight record is a minimally intrusive means to monitor a resident's health status.

COMMENT #75: Why do we need to be so regulated and leave a rule open for personal interpretation of whether the facility or a staff member has met the parameters of the Rule XVII(2)(f) (ARM 37.106.2829). Why is contact with a family member required as part of the documentation?

RESPONSE: The department believes a record of significant events, which includes the facilities response to the event, is essential to monitoring the safety and well being of the resident. The department agrees that the rule as written leaves interpretation open to the individual and has responded by including a definition of "significant event" in the rules. The department believes that contact with a family member is an essential step to assuring the safety and well being of the resident when a significant event has occurred. Documentation of the contact is a means for the provider to maintain accountability.

COMMENT #76: Maintaining an inventory of a resident's possessions should be offered to a resident, but not required.

RESPONSE: The department agrees and has removed this requirement from the rule.

Rule XVIII (ARM 37.106.2830)

COMMENT #77: Facilities do not control the third party provider and DPHHS appears to be trying to control the third party provider through the assisted living license.

RESPONSE: The department agrees and has removed (3) and (4) from the proposed rule.

Rule XIX (ARM 37.106.2831)

COMMENT #78: This rule should be amended to provide minimum standards for recreational activities as envisioned by the statute and to recognize that all activities do not need to be "planned".

RESPONSE: The department believes that a planned activity schedule is neither too prescriptive nor does it preclude any resident's involvement in unplanned activities. An activity schedule and the resultant resident involvement in the activity assist in preserving the mental, social and physical integrity of the resident. The department does however believe that (3) is redundant with (4) and has removed (3) from the proposed rule.

Rule XX (ARM 37.106.2835)

COMMENT #79: This proposal covers issues dealt within the building codes applicable to personal care facilities. This rule should be amended to cover only those issues not dealt with elsewhere.

RESPONSE: There are no state building code requirements for personal care facilities. The department has been given the responsibility to develop standards by the legislature. The rule does refer the reader back to the local fire or building code authority when appropriate. See Rule XX(1) and (12)(f) (ARM 37.106.2835).

Rule XXI (ARM 37.106.2836)

COMMENT #80: Furnishings for an apartment should not be regulated. A rule of this nature would increase the costs to the residents significantly.

RESPONSE: The department agrees that the provision of basic furnishings should be at the discretion of the facility and has amended the rule accordingly.

Rule XXII (ARM 37.106.2837)

COMMENT #81: This rule appears to require sufficient dining space for all residents to eat at one seating. The department should defer to provisions of building codes applicable to personal care facilities.

RESPONSE: This rule specifies the amount of common area which must be provided. Common area is described as living or recreational and dining room area of at least 30 square feet per resident. The facility may choose to have a smaller dining area and a larger living room and have residents eat in shifts. The facility may also choose to have a large dining area with a smaller living room. Either are acceptable as long as there are

at least 30 square feet per resident.

Rule XXIII (ARM 37.106.2838)

COMMENT #82: Rule XXIII (ARM 37.106.2838) does not indicate that facilities already in existence will be "grandfathered" in.

RESPONSE: The department agrees and has added an additional section to specify that any portion of this rule may be waived at the discretion of the department if the safety of residents and staff is not diminished.

COMMENT #83: Rule XXIII(3)(a) (ARM 37.106.2838) should allow the sink to be located in another area, not in the same room as the toilet. Some toileting rooms in existing facilities, which were designed to be more handicapped accessible, have the sink in the main room. This is an expensive, unnecessary requirement.

RESPONSE: The department has edited the rule to clarify that the intent is to have the sink in close proximity to the toilet.

COMMENT #84: Rule XXIII(4) (ARM 37.106.2838) does not indicate that facilities already in existence will be grandfathered in. This clause needs to be included. To change all of the bathroom doors in a facility to meet the requirement that "all doors to resident bathrooms shall open outward or slide into the wall" would require significant remodeling.

RESPONSE: The department disagrees. This is a relatively low cost remodeling project where the safety risk is considerable. A door which swings inward is a significant safety risk to a resident. If the resident falls inside the toilet room, the door will likely be blocked by that resident and the resident will be unaccessible unless the door is removed. The hinges are not accessible on a door which swings inward so to get inside with the resident the door will have to be physically removed with an axe or saw. For a resident with a serious health condition such as a heart attack, this delay may result in a preventable death.

COMMENT #85: In Rule XXIII(5) (ARM 37.106.2838), when do we take one's dignity away and say that their bathroom does not have to be in a separate room or does not require a door? At a minimum, there should at least be a drape around the toilet area.

RESPONSE: The department agrees that personal dignity should be maintained by having a door on the bathroom in all cases where the resident's safety or ability to use the toilet is not threatened by the presence of a door. The exception in (5) was written very narrowly for this reason. Some cognitively impaired or special needs residents are able to toilet more independently and effectively, however, when the toilet area is

designed as part of their bedroom and is not separated by a door. The omission of a door would not be an appropriate alternative for a bathroom located other than in a bedroom.

COMMENT #86: Rule XXIII(7) (ARM 37.106.2838) should allow for pendant systems which many times are superior to a hard wired system with a cord. Residents rarely fall in proximity to their pull cords and the requirement for a hard wired system would do little or nothing to improve resident safety over current requirements.

RESPONSE: The department concurs and has removed the word "fixed". This will allow pendant systems to be used.

COMMENT #87: To the extent issues are already addressed in building codes and fire and life safety codes applicable to this type of occupancy, they should be deleted from this rule.

RESPONSE: There are no state building code requirements for personal care facilities. The department has been given the responsibility by the legislature to develop standards.

Rule XXIV (ARM 37.106.2839)

COMMENT #88: Rule XXIV(3) (ARM 37.106.2839) should be amended to delete the phrase about consideration of each resident's preferences. It's impossible to set the temperature in a way that takes all preferences into account.

RESPONSE: The department agrees and has removed this phrase from the rule.

COMMENT #89: In XXIV(4)(a), (b) and (5) (ARM 37.106.2839) should be deleted. State law provides that health care facilities may be non-smoking and provides requirements for non-smoking areas in public buildings.

RESPONSE: The department believes that the inclusion of these sections of rule assist in safeguarding the rights of smokers and non-smokers.

COMMENT #90: Rule XXIV(2) (ARM 37.106.2839) should be deleted in its entirety because these standards are contained in ARM 37.106.321 environmental control standards for all health care facilities.

RESPONSE: The department notes that ARM 37.106.321 does not address temperature control or provisions for smokers and non-smokers, therefore a separate section addressing environmental control in the assisted living rules is necessary.

Rule XXV (ARM 37.106.2843)

COMMENT #91: Rule XXV(1) (ARM 37.106.2843) is written as if

services must be provided whether a resident wants/needs them or not.

RESPONSE: The department disagrees. Rule XXV(1) (ARM 37.106.2843) specifies that assistance must be provided to each resident in accordance with their "needs".

COMMENT #92: Some residents choose not to be "appropriately dressed for the season in clean clothes" or to groom themselves appropriately. Rule XXV(2) (ARM 37.106.2843) should be clarified to allow for resident choice.

RESPONSE: Resident choice is encouraged throughout these rules. The Montana Long-Term Care Residents' Bill of Rights, which is incorporated by reference in Rule XVI (ARM 37.106.2828), specifies that competent residents must be given the freedom to make choices about the care they receive. It would be redundant to restate that residents are free to exercise choice in each rule.

COMMENT #93: Rule XXV(2)(b) and (c) (ARM 37.106.2843) should be revamped or deleted. These outcomes are not tied to a required service standard.

RESPONSE: The department disagrees. Services to assist the residents to maintain their emotional well being and personal dignity are a paramount part of personal care services that must be looked at in a global manner. These subsections outline the department's expectations for the kind of care that will be provided by a personal care facility.

COMMENT #94: Add language to Rule XXV(2)(b) (ARM 37.106.2843) specifying "so far as the resident's physical, mental and emotional condition allows".

RESPONSE: The department disagrees. Individualized care to meet the specific needs of the resident is emphasized throughout these rules. It would be redundant to state this in Rule XXV(2)(b) (ARM 37.106.2843).

COMMENT #95: Rule XXV(3)(b) (ARM 37.106.2843) requires notification of next of kin or responsible party. It should be changed to clarify the right of privacy of competent residents.

RESPONSE: Resident choice is encouraged throughout these rules. The Montana Long-Term Care Residents' Bill of Rights, which is incorporated by reference in Rule XVI (ARM 37.106.2828), specifies that competent residents must be given the freedom to make choices about the care they receive. It would be redundant to restate that residents are free to exercise choice in each rule.

COMMENT #96: The term "physician" should be replaced with "practitioner" in Rules XXV (ARM 37.106.2843), XXVIII (ARM

37.106.2848), XXXI (ARM 37.106.2855), XLI (ARM 37.106.2875) and XLIII (ARM 37.106.2879).

RESPONSE: The department concurs and has made the appropriate changes to the rules.

COMMENT #97: The requirement to complete an incident report, except in the event of a non-suspicious death, should be added to Rule XXV(3) (ARM 37.106.2843).

RESPONSE: The department disagrees. Incident reports are generally internal facility documents that are not part of the medical record. Mandating that such a report be completed would result in unnecessary paperwork. The long term care ombudsman and the department's licensure bureau must be notified of any suspected cases of abuse or neglect under the elderly abuse protection statutes.

Rule XXVI (ARM 37.106.2846)

COMMENT #98: Is it legal for facilities to transfer narcotics to the resident or family member?

RESPONSE: The department has addressed this concern in Rule XXVI(5) (ARM 37.106.2846). The facility shall develop and implement a policy for lawful disposal of unused, outdated, discontinued or recalled resident medications. The facility shall return a resident's medication to the resident or resident's legal representative upon discharge. It is unlawful to transfer narcotics or any other controlled substance to anyone other than the individual (or their legal representative) it is prescribed for. Therefore the facility shall have a policy for the lawful disposal of unused, outdated or discontinued controlled substances.

Under SB 420, codified as 2001 Laws of Montana Chapter 331, a sample controlled substance form has been developed incorporating various documentation requirements. Pages 65 through 101 of Module 3 of The Management Library of Administrators and Executive Directors Training System also provides basic medication storage, disposal and documentation guidelines for assisted living facilities.

COMMENT #99: I feel Rule XXVI (ARM 37.106.2846) infringes upon the resident's rights when requiring their medication in their rooms be locked up. This is taking away their choice to have their medications close at hand so they are able to use them as needed.

RESPONSE: Each facility and each population differs. At times other residents may become confused or disorientated, or small children may visit. In this past year there have been several incidents of medication theft involving arthritic pain medication. Education of staff, families and residents will

also aid in preventing the abuse and misuse of medications, especially controlled substances. Locking medications is a basic home safety measure to prevent accidental use or theft of medications.

Rule XXVII (ARM 37.106.2847)

COMMENT #100: This entire rule seems to apply only to category B residents particularly as it relates to medications which can only be "administered" to a category B resident. We recommend that this rule be included with the rules applicable to category B facilities.

RESPONSE: The department agrees that Rule XXVII(1) (ARM 37.106.2847) applies specifically to category B residents. The rule has been modified by moving Rule XXVII(1) (ARM 37.106.2847) to Rule XLVI (ARM 37.106.2885). Rule XXVII(2) (ARM 37.106.2847) has been modified to reflect category A level residents' needs in this rule. Rule XXVII(3) (ARM 37.106.2847) applies to both category A and B and will remain in this rule.

COMMENT #101: The department should not allow 21 days for a physician to submit a written confirmation of a verbal order for a medication. We do not want to assume the liability for that long.

RESPONSE: The department believes that 21 days is a reasonable time frame. The facility may set a shorter time frame for physician orders if they choose.

Rule XXVIII (ARM 37.106.2848)

COMMENT #102: Please do not allow family, by whatever definition, to set up medications for medication assistants to administer.

RESPONSE: The facility may establish a facility specific criteria for who may set up medications. They do not have to allow family members to perform this task. Although we share your concern for the resident's safety, in small rural areas of Montana there may be limited or no licensed health care professionals available nor pharmacies in the area capable of alternative systems of medication organization. If the resident was at home, family members would be able to provide this assistance. The resident's service plan should address this concern.

COMMENT #103: In Rule XXVIII(3)(a) (ARM 37.106.2848), delete "certified nurse practitioner" as this term is redundant and change "advance" to "advanced" practice registered nurse.

RESPONSE: The department has eliminated Rule XXVIII(3)(a) (ARM 37.106.2848) in response to comment #103.

COMMENT #104: For Rule XXVIII(1) (ARM 37.106.2848) "encourage" should be replaced with "those category B residents who wish to self-administer and who are able to do so to self-administer".

RESPONSE: The department concurs that category B resident rights may be infringed and/or facility staff may misinterpret the intent of this rule. A modification has been made.

COMMENT #105: Rule XXVIII(2)(a) through (g) (ARM 37.106.2848) should be deleted from this rule and included in the definition rule for the definition of assistance with self-administration of medications and Rule XXVIII(2) (ARM 37.106.2848) language changed to apply to any direct care staff who qualifies to assist with self-administration of medication.

RESPONSE: The department concurs and has made these modifications.

COMMENT #106: This rule is confusing, please clarify it by identifying the sections that apply to category B in the category B requirements.

RESPONSE: The department agrees that this rule is confusing. By moving the definition for self-administration assistance to the definition rule and moving Rule XXVIII(3) (ARM 37.106.2848) to the category B rules, the rule applies to category A medication self-administration and preparation.

COMMENT #107: In Rule XXVIII(4) (ARM 37.106.2848), why are injectables limited to seven days, as opposed to four weeks for other medications?

RESPONSE: The department has clarified this rule. The most commonly used injectable in assisted living is insulin. After seven days the quality of the insulin in a syringe is questionable and not recommended. Other medications have longer and shorter time frames and are not addressed in this rule. Insulin has been added to clarify the rule and the addition of a pharmacist's recommendation for all other injectable medications be followed.

Rule XXIX (ARM 37.106.2849)

COMMENT #108: Rule XXIX(1), (2) and (3) (ARM 37.106.2849) all refer to administration of medications, which is applicable to the category B only.

RESPONSE: The department concurs and Rule XXIX(1), (2) and (3) (ARM 37.106.2849) have been edited and added to the category B requirements at Rule XLVIII (ARM 37.106.2886).

COMMENT #109: Category A facility rules on medication records and documentation need to be clarified.

RESPONSE: The department agrees. Rule XXIX(1), (2) and (3) (ARM 37.106.2849) have been edited to address the monitoring and/or assistance with self-administration of medications. The remainder of Rule XXIX (ARM 37.106.2849) addresses "self-administration" rather than "administration".

COMMENT #110: In Rule XXIX(2)(a) (ARM 37.106.2849), why is the reason for use included? Should this not be placed in the medication administration records for skilled nursing facilities or acute care facilities?

RESPONSE: Assisted living is a social model, not a medical model. The majority of assisted living (personal care) facilities in Montana are not staffed by nor required to be staffed by medical personnel. Since the elderly often have numerous medications providing direct care staff with the "reason for use" provides a necessary safety measure for self-administration in the assisted living setting.

COMMENT #111: Why is it necessary for a resident to have a written order by their doctor to keep over-the-counter medications in their apartments?

RESPONSE: Rule XXIX(4) (ARM 37.106.2849) ensures that the resident's physician or a licensed health care professional has assessed the resident's ability for self-medication. Often the resident's cognitive, physical and/or visual ability may decline with the aging process, making it unsafe for the resident to self-administer medications. Therefore, it is important for providers to observe residents daily and if necessary, request a resident assessment for self-medication. This rule ensures an annual assessment as a minimal requirement.

Rule XXX (ARM 37.106.2853)

COMMENT #112: Does Rule XXX(4)(a) (ARM 37.106.2853) include empty tanks?

RESPONSE: Yes, this subsection has been modified to make it clearer.

Rule XXXII (ARM 37.106.2859)

COMMENT #113: Rule XXXII(1)(c) (ARM 37.106.2859) requires birds to be in enclosures at all times. This interferes with the "Eden" concept and with resident choice. What if a resident brings her bird from home and keeps it in her room? Is the facility required to stop her from letting her bird sit on her shoulder as it did for years at home?

RESPONSE: The department has modified Rule XXXII (ARM 37.106.2859) to include verification for the treatment and prevention of avian illnesses and diseases (specifically psittacosis). Since cats and dogs are required to have

verification of rabies, this is consistent with ensuring pet and resident health while allowing normal healthy pet/owner relationships to continue in the assisted living setting. Allowances for the timely availability of a veterinarian examination is included. Companion birds are often very attached to their owners, so limiting exposure to other residents and pets while allowing the owner and pet to maintain their relationship prior to a veterinarian examination was also considered in editing this rule. Since companion birds are sensitive to cold weather, forcing an examination may be harmful to the bird during the fall, winter and early spring. Isolation of the companion bird in the resident's room and requiring good hand washing by the owner after handling the bird is recommended under these conditions.

Rule XXXIII (ARM 37.106.2860)

COMMENT #114: This rule should be deleted in its entirety as food service requirements for all health care facilities are found at ARM 37.106.311 and provide sufficient minimum standards for personal care facilities.

RESPONSE: The department believes that this rule should be retained in the text of the assisted living rules as it addresses the needs of individual residents. ARM 37.106.311 is incorporated by reference into the rule, however this rule focuses on the health and safety issues of the food service establishment.

COMMENT #115: Requiring every meal to include an alternate food or drink from which the resident may choose is expensive and burdensome for small providers.

RESPONSE: The department agrees and has removed Rule XXXIII(3) (ARM 37.106.2860) from the proposed rule.

COMMENT #116: The resident's preferences should not guide the facility menu planning. This would better serve the health of the residents if the rule read, "The facility shall take into consideration the preferences of the residents when planning the menu."

RESPONSE: The department agrees with the proposed language and has revised the rule.

COMMENT #117: Rule XXXIII(1)(b) (ARM 37.106.2860) prohibits the use of home-canned foods. Does this mean that if a resident's family member provides a resident with a jar of home made jam, jelly, salsa, etc. that the resident cannot eat it? Cannot share it with friends in the facility?

RESPONSE: This rule pertains to the facility which cannot use home-canned foods in its menus because they may not be properly preserved and could cause a food borne illness. It is not

intended to restrict the resident.

COMMENT #118: Rule XXXIII(2) (ARM 37.106.2860) requires regular meal times....this fails to take into account that assisted living residents decide when to get up, go to bed, eat, snack, etc.

RESPONSE: The department believes that establishing regular meal times is appropriate in a congregate living situation and will retain the rule as currently written.

COMMENT #119: Rule XXXIII(5) (ARM 37.106.2860) requires menus to be written a week in advance. What difference does it make if menus are determined less than a week in advance, as long as nutritious meals are served?

RESPONSE: The department agrees and has revised the rule.

COMMENT #120: Rule XXXIII(6) (ARM 37.106.2860) prohibits a meal from being repeated more than once in a two week period. Most of us do not have that kind of variety at home. This means even the residents most favored foods can't be served more often than once in two weeks.

RESPONSE: The department agrees and has revised the rule.

COMMENT #121: The facilities should not be required to provide "therapeutic diets". It is reasonable for a facility to be expected to provide such diets as "no added salt", "reduced concentrated sweets", "controlled carbohydrates", "low fat and low cholesterol". It should be the choice of the facility whether they choose to provide complex diets and should be disclosed to the resident before move-in.

RESPONSE: The department believes that the rule as currently written provides the latitude to the provider as recommended by the commentor. If the facility admits residents requiring therapeutic or special diets, the facility shall have an approved dietary manual for reference when preparing a meal.

COMMENT #122: Requiring that temperatures be monitored in all refrigerators and recorded once a month should be struck from the rule.

RESPONSE: The department believes that monitoring the temperature of the refrigerator is a simple, low or no cost step to assure proper food storage.

COMMENT #123: The excessive nature of the regulations, if passed will significantly increase cost and force a number of small facilities out of business...Example: 'Food service' - "if a resident is unable to eat a meal or refuses to eat a meal, this must be documented in the residents record if there is a medical reason or if it is otherwise appropriate".

RESPONSE: The department agrees that this section of rule is unnecessary and has removed it.

Rule XXXIV (ARM 37.106.2861)

COMMENT #124: This rule should be amended to reflect the negligible risk associated with the handling of laundry.

RESPONSE: The department agrees and has revised the rule to so provide.

COMMENT #125: Are other types of facilities required to provide laundry equipment with its attendant liability or only personal care?

RESPONSE: The department believes that it is reasonable to require the provision of laundry service by or in an assisted living facility.

COMMENT #126: The provision of linens should be the choice of the facility.

RESPONSE: The department believes that it is reasonable to require the provision of linens in an assisted living facility.

Rule XXXV (ARM 37.106.2862)

COMMENT #127: This proposal is too prescriptive. It doesn't matter if cleaning supplies are "conveniently" stored, what matters is that they are used and the facility is kept clean. Another example is a schedule for taking out the trash and cleaning and sanitizing the garbage containers. We can only assume that if there's a schedule set out in the regulation, it will also require the facility to keep a log so they can prove they did it.

RESPONSE: The department agrees and has revised the rule.

Rule XXXVI (ARM 37.106.2865)

COMMENT #128: Rule XXXVI(9) (ARM 37.106.2865) needs to be clarified since it seems to require that furniture, curtains, and any other items that a resident might lean on or hold onto for support must be anchored down.

RESPONSE: The department agrees that the intent of Rule XXXVI(9) (ARM 37.106.2865) is unclear and has clarified this section.

COMMENT #129: Rule XXXVI(16) (ARM 37.106.2865) should be deleted. Facilities should not be required to fence off natural streams, fishing ponds, etc. that are aesthetically appealing and there for residents' enjoyment. These kinds of features add immensely to the quality of life of our residents and the point

is lost if they are fenced off.

RESPONSE: The department agrees.

COMMENT #130: Rule XXXVI(17) (ARM 37.106.2865) deals with issues regulated by the Water Quality Bureau.

RESPONSE: The department can only infer what the respondent meant because no suggestions were offered on how to modify the rule. The department believes that water safety standards for facilities with non-municipal water sources should be monitored by the licensure bureau to assure safety of the residents in these facilities.

Rule XXXVII (ARM 37.106.2866)

COMMENT #131: We recommend that Rule XXXVII(8) (ARM 37.106.2866) be changed to provide for one resident fire drill.

RESPONSE: The department believes that the requirement of two fire drills per year is a reasonable standard.

Rule XXXVIII (ARM 37.106.2872)

COMMENT #132: We recommend that Rule XXXVIII(2) (ARM 37.106.2872) be amended to allow LPNs to perform those duties listed that are within their scope of practice.

RESPONSE: The department has consulted the Board of Nursing regarding this request. The Board of Nursing's review of category A rules find that the LPN can work within the scope of practice identified under the direct care staff limitations. However, an LPN performing duties within their scope of practice in category B facilities with category B residents must be under the direct supervision of a licensed health care professional as found in the definitions. Therefore, subsection (2)(d) now includes LPN in addition to unlicensed assistive personnel.

COMMENT #133: I suggest that the department require only a service plan and with a category B resident it include any health care that we provide.

RESPONSE: The department believes each category B resident has special needs and acuity. The health care plan may include licensed health care professional assessment and development while the service plan may not. There may be cases where the health care plan can be incorporated into the service plan and there may be other cases where services provided by the facility are separate from care provided by the licensed health care professional. Rule XXXVIII(2)(c) (ARM 37.106.2872) addresses the variation of special needs and acuity by including the registered nurse or supervising nursing service in the resident service and health care planning process.

COMMENT #134: Why aren't LPNs included in the definition of "licensed health care professionals"?

RESPONSE: The department has consulted the Board of Nursing for clarification. LPNs cannot work independently in an assisted living setting. Under the Montana Nurse Practice Act, LPNs providing skilled nursing services must work under the direct supervision of a licensed health care professional as found in Rule V(13) (ARM 37.106.2805).

Rule XXXIX (ARM 37.106.2873)

COMMENT #135: It is not appropriate to limit qualifications to a nursing home administrator's license and one course offered by one organization. In addition one year of experience is required. This is more stringent than the requirement for nursing home administration where licensure is all that is required, no experience in addition to licensure.

RESPONSE: The department believes that establishing an expectation that administrators possess core training and knowledge of the elements of assisted living care is essential to assure protection of the safety and physical, mental and emotional health of residents. The department believes that the requirement of one year experience for an administrator of a B level facility is reasonable. Category B level residents frequently have the same skilled nursing care needs as residents in a nursing home, however the assisted living environment does not require that the facility be staffed with skilled nurses and CNAs as is required in a nursing home. This rule has been developed to increase the assurance that administrators of category B level facilities have a greater understanding and ability to meet the needs of skilled nursing care residents.

COMMENT #136: The department should recognize and accept Nursing Home Administrator's licenses received from other states. Current administrators should be "grandfathered" and "be recognized as Administrators by the department".

RESPONSE: The department agrees that the state should recognize and accept proof of current nursing home administrator's licenses received from other states, and has revised the Rule VIII (ARM 37.106.2814) to reflect this change. The department disagrees that current administrators who cannot provide proof of either nursing home administration license or of successful completion of ALFA be grandfathered in as department experience has found that years of experience do not necessarily equate into administrative understanding of the responsibilities in assuring that the needs of all residents are met.

COMMENT #137: We would like to have more flexibility with the administrator being able to work between the different homes together.

RESPONSE: The department believes that the rules do not prohibit any qualified individual from being the assigned administrator in more than one facility, as long as that individual assures that the administrative responsibilities set forth in the rule are met.

Rule XL (ARM 37.106.2874)

COMMENT #138: CNAs do not make better assisted living aides than non-CNAs. CNA staff typically have a "nursing home attitude" instead of the "social model of care", which is the concept behind assisted living.

RESPONSE: This comment was the most frequently submitted testimony. The department has reversed the decision to require CNA training and staffing in assisted living facilities. The modifications to the rule have been made.

COMMENT #139: "At least one person per shift shall hold a current CPR certificate." However, Rule X(2)(o) (ARM 37.106.2816) already requires category A staff to have CPR certification.

RESPONSE: The department has reviewed this issue. The safety of all employees, residents, family members and visitors is increased with basic CPR and first aid training and is required for category A personal care facility staffing. The emphasis for facilities is to respect and apply the resident's advanced directives. Rule XL (ARM 37.106.2874) has been modified to reflect this correction.

COMMENT #140: Make some rules subject to size of a facility, such as... Rule XL (ARM 37.106.2874).

RESPONSE: Due to the numerous testimonies the department has received regarding the requirement of CNAs for all facilities regardless of size, this rule was not adopted.

RULE XLI (ARM 37.106.2875)

COMMENT #141: This rule requires a separate document - a health care plan. There is no reason that all services to be provided cannot be included in one document, such as a service plan or other appropriate document. Rule XLI(5) (ARM 37.106.2875) requires the health care plan be available to all staff, however, this should be changed to be available to those who provide care to the individual resident. There are privacy and HIPAA issues involved and questions of who needs to know.

RESPONSE: This comment answers itself. There are situations where issues of privacy and HIPAA would result in the licensed health care professional developing a separate health care plan available to only those who are providing care to the individual resident. Rule XLI(5) (ARM 37.106.2875) has been modified to

correspond with this observation and need.

Rule XLII

COMMENT #142: The department has indicated that they will withdraw Rule XLII in light of their recent adoption of rules relating to safety devices and restraints. We support the withdrawal of Rule XLII.

RESPONSE: The department has replaced Rule XLII with a reference to rules ARM 37.106.2901, 37.106.2902, 37.106.2904, 37.106.2905 and 37.106.2908 by adopting a new rule, Rule XLVII (ARM 37.106.2854). These rules specify the conditions under which restraints, safety devices, assistive devices and postural supports may be used along with the documentation and staff training their usage requires.

COMMENT #143: Add your choice of greater than 1/2 or 1/3 length for siderails.

RESPONSE: New Rule XLVII (ARM 37.106.2854) references ARM 37.106.2904. The length of the siderails has been specified in ARM 37.106.2904(5). Rule XLII has not been adopted - for further explanation see Response #142 above.

Rule XLIII (ARM 37.106.2879)

COMMENT #144: According to the new proposed regulations for category A, incontinence does not disqualify a resident from a category A facility. Should this rule be under the rules for category A instead of applying to category B?

RESPONSE: The proposed legislation which specifies that an incontinent resident does not automatically have to be a category B resident has not yet been introduced or approved by the legislature. This suggested change is outside of the existing authority of this rule revision.

Rule XLIV (ARM 37.106.2880)

COMMENT #145: Rule XLIV(5)(b) (ARM 37.106.2880) should allow LPNs to train direct care staff about skin care and prevention and care of pressure sores.

RESPONSE: The department has consulted the Board of Nursing for clarification. LPNs cannot work independently in an assisted living setting. Under the Montana Nurse Practice Act, LPNs providing skilled nursing services must work under the direct supervision of a licensed health care professional as found in Rule V(13) (ARM 37.106.2805).

COMMENT #146: A category A resident might have a stage 1 or 2 pressure ulcer, should this rule be under the regulations for category A instead of category B?

RESPONSE: The department appreciates this recommendation, as pressure sores are frequent in the elder population and unfortunately can be overlooked. A modified version of this rule has been added to Rule XXV (ARM 37.106.2843) for category A residents and Rule XLIV (ARM 37.106.2880) remains as proposed for category B residents.

Rule XLV (ARM 37.106.2884)

COMMENT #147: Does an administrator who also provides direct care also have to be a CNA? Rule XLV(4) (ARM 37.106.2884) requires direct care staff to be trained as CNAs and have additional training. This is more stringent than required for CNAs in nursing homes caring for severe cognitive impairment. We recommend that this rule be amended to require appropriate standards.

RESPONSE: The department has reversed the decision to require assisted living staff, including administrators, be CNA trained and certified. Rule XLV(4) (ARM 37.106.2884) has been modified to not require CNA training.

COMMENT #148: Rule XLV(2)(a) through (i) (ARM 37.106.2884) requires facilities that specialize in dementia care to distinguish its care and treatment as being especially applicable to or suited for such persons and to make a number of disclosures to residents or their representative. There is no requirement for nursing facilities or others who provide specialty care to do this. The department seems to be developing rules for category C absent legislative authority to establish an additional category of personal care facility. Rule XLV(2) (ARM 37.106.2884) should be deleted.

RESPONSE: The department disagrees. This rule does not establish a category C, but, rather, provides additional protections for cognitively impaired persons residing in category B facilities. Additionally, a number of facilities are currently advertising that they specialize in caring for residents with severe cognitive impairments. These advertisements lead families to believe that facilities have expertise in providing this type of care.

Rule XLV(2) (ARM 37.106.2884) specifies the minimum standards that the department believes that a facility who advertises and offers such care should abide by. This is an area where the department is particularly concerned about the health and safety of personal care facility residents because of their lack of ability to self direct their care and their resulting vulnerability. It is also an area that the department currently receives numerous complaints about.

Nursing facilities and other health care facilities operate under different regulations and are not comparable to personal care facilities in the provision of services for severe

cognitive impairment. Nursing facilities must have a nurse on staff 24 hours a day. They are also required to have a medical director.

COMMENT #149: The words "staff must remain awake, fully dressed" should be removed from Rule XLV(3) (ARM 37.106.2884). This adds to the expense of providing personal care facility services. Many of us have been meeting the intent of this rule without such a provision and without compromising the safety of residents.

RESPONSE: The department disagrees. This is an area where the department is particularly concerned about the health and safety of personal care facility residents because of their lack of judgement/ability to recognize and avoid dangerous situations and the propensity of some residents to wander away from the facility. The department believes that staff must be awake and fully dressed at all times to provide supervision for severely cognitively impaired residents and intervene in behaviors that are deleterious to the resident's health and safety.

COMMENT #150: All current administrators should be grandfathered. The state should accept other states licenses.

RESPONSE: The department agrees that the state should recognize and accept proof of current nursing home administrators licenses received from other states, and has revised Rule VIII (ARM 37.106.2814) to reflect this change. The department disagrees that current administrators who cannot provide proof of either nursing home administration license or of successful completion of ALFA be grandfathered in as department experience has found that years of experience do not necessarily equate into administrative understanding of the responsibilities in assuring that the needs of all residents are met.

Rule XLVI ARM (37.106.2885)

COMMENT #151: This rule does not allow LPNs to administer medications. We recommend that this rule be changed to allow LPNs to administer medications pursuant to their scope of practice.

RESPONSE: Under federal regulations, long term care LPNs can administer medications under specific conditions. The department has consulted the Board of Nursing for clarification of this issue. LPNs cannot work independently in an assisted living setting. Under the Montana Nurse Practice Act LPNs providing skilled nursing services must work under the direct supervision of a licensed health care professional as found in Rule V(13) (ARM 37.106.2805). In category A facilities the LPN may set up self-administration medications under the same criteria as the unlicensed direct care staff. In category B facility settings the LPN must work within the Montana Nurse Practice Act requiring supervision from a licensed health care

professional. Rule XLVI (ARM 37.106.2885) has been modified accordingly.

COMMENT #152: Rule XLVI(2) (ARM 37.106.2885) does not address the cognitively impaired resident who may not be able to understand that an over-the-counter pain medication will help a headache, therefore, would not ask for the medication. However, the cognitively impaired resident can indicate having a headache or pain. These residents shouldn't be a category B or living in a nursing home.

RESPONSE: The department has modified Rule XLVI(2) (ARM 37.106.2885) to take in consideration this special circumstance.

Miscellaneous Comments

COMMENT #153: Residents who require help with more than three activities of daily living should not be forced into either a category B bed or a skilled nursing facility.

RESPONSE: The issue raised is not part of the proposed rules and is therefore outside of the scope of this rulemaking. The recommendation will be taken into consideration as the department moves forward with legislation about personal care facilities in the 2003 legislative session.

COMMENT #154: The number of category B beds that a personal care facility is permitted should be proportionate to the total number of beds in the personal care facility. It should not be limited to only five beds.

RESPONSE: The five bed limit is specified in the enabling legislation for this rule. Increasing the number of beds would require a legislative change. It is outside of the scope of this rulemaking process. The recommendation will be taken into consideration as the department moves forward with legislation about personal care facilities in the 2003 legislative session.

COMMENT #155: These regulations will increase liability insurance costs because they allow a higher level of acuity to be provided in the personal care facility. This will increase the liability exposure from an insurer's point of view regardless of the amount of regulations that accompany the acuity. The department needs to consider all of the consequences before it develops new regulations that have a financial impact on providers.

RESPONSE: The proposed rules do not allow a higher level of acuity. The department has introduced legislation for the upcoming session, which if passed, would allow for a higher level of acuity in personal care facilities. Your comments will be taken into consideration as we proceed with this legislation.

COMMENT #156: The provision of personal care facility services

is market driven where a willing seller offers services to a willing buyer. The proposed rules will increase the cost of care in personal care facilities. This increased cost will cause residents to exhaust their personal funds quicker, potentially throwing them into the already overtaxed welfare system or causing them to stay in their own homes past the time when they can safely live independently. It will also result in the closure of facilities who will be driven out of business because residents will not be able to afford the charges associated with complying with the rules.

RESPONSE: The 2001 legislature passed SB 420, codified as 2001 Laws of Montana Chapter 331, which instructed the department to review the administrative rules and assess whether changes in the rules were necessary. The rules had not been revised since 1994 and were found, by the department, to be inadequate in many areas to address the needs of personal care facility residents. The proposed rules seek to balance the needs of consumers and providers. Individual comments about ways to improve these rules have been carefully considered. We have adopted suggestions which we believe will improve the rules and not endanger the safety of consumers.

COMMENT #157: The proposed rules amount to over-regulation focusing on process and paperwork. The rules should be minimum standards below which providers may not fall, not "best practices", and should be resident focused and outcome oriented.

RESPONSE: As stated in the last response, the department has tried to achieve a balance in these proposed rules. We do not believe that anything that was included in the rules will not ultimately improve care for the resident. We have received many comments both in the work group and in the public meetings preceding this rule that we should only look at "outcomes". Solely using outcome based measures was considered by the department and rejected for a number of reasons. For one, this is a concept that is widely embraced but very little has been done throughout the country to define what an acceptable outcome measure is.

An example would be "free from falls". No facility can ever be completely safe. What degree of risk are we in society willing to tolerate? How many falls are acceptable in a year and by what percentage of the residents? Does it make a difference whether the fall results in a broken hip or in a skinned knee? Is it better to restrain someone in a bed to assure that they never fall, knowing that they are at greater risk of losing what limited mobility they may have? Does your opinion differ when it is your mother rather than my mother who has fallen?

There are also situations that are so potentially disastrous and where the prevention is so simple that even one bad outcome is not acceptable. An example would be a person choking on a piece of meat and dying because no one in the facility knows how to do

the Heimlich maneuver. If a facility was lucky, it could go for years without ever having an instance of choking. It could happen tomorrow though and if no one on duty knows how to do the Heimlich maneuver it may prove to be fatal. There are also licensing requirements that are simply not outcome based. Fair hearing rights when a resident feels that the facility has discharged them without cause would be an example.

COMMENT #158: I want to compliment most of the proposed regulations. The "old" regulations were very general, loosely written, and too open to interpretation. More oversight is needed due to the incredible growth of assisted living in Montana.

RESPONSE: The department appreciates your support.

COMMENT #159: By the department's own admission little consensus was reached in the work group. More time is needed to hear testimony, gather data, hear from experts in the Alzheimer's industry, and communicate with residents and families to hear what they want, etc.

RESPONSE: The department considered delaying the implementation of these rules and rejected this option because we have worked for over a year with providers, associations, family members, legislators, and advocates and have been unable to reach a common vision of what personal care should look like in Montana. We did not believe that there was a reasonable expectation that further meetings at this time would bring us closer to reaching consensus. The department remains committed to working with the aforementioned groups and revising the rules in the future as needed.

COMMENT #160: How can the department burden facilities with these regulations when it is not paying for the care. The existing waiver program funding is so minimal that it does not justify this kind of regulatory mandate.

RESPONSE: The legislature has designated the department as the entity who licenses health care facilities for all residents regardless of their payment sources. The legislature is also responsible for appropriating funding for the waiver program.

COMMENT #161: The department states that the work group for SB 420, codified as 2001 Laws of Montana Chapter 331, determined that it was necessary to repeal the current administrative rules and adopt these proposed rules. This was a decision made by the department, not the work group. Many members of the work group expressed strong concerns about the extensiveness, prescriptiveness, and paperwork focus of the proposal. It was the expressed desire of the workgroup to address statutory changes first, then follow with one rule making process. These rules are not seen as necessary at this time, given the upcoming effort to change personal care statutes. We urge the department

to delay implementation of these rules until after the legislature has an opportunity to consider the department's proposed changes to assisted living statutes.

RESPONSE: The work group was advisory to the department. No consensus was reached in the group in many areas of the proposed rules nor in the proposed legislation. Some members of the group were concerned that the rules were too prescriptive. Some members of the group thought that they were too provider oriented and did not focus enough on consumers of services. Ultimately, the department weighed the advice of the work group, our experience with licensing these facilities for approximately a decade, our research into what has been done in other states and decided to proceed with these rules at this time.

COMMENT #162: The ombudsman program comes from a point of view that results from hearing mostly about the negative outcomes occurring in personal care homes and the need for more consistent regulation. The legislature called for a task force to review the statutes and rules, in part, as a response to concerns they were hearing from consumers. The ombudsman program has heard repeatedly at the task force meetings and at the rule hearing about the concerns of what increased regulation would do to some personal care homes in existence. What they haven't heard a lot about is what the increased regulations would do for consumers. Some personal care homes, currently in existence, are why issues have repeatedly come to the legislature and ombudsman program and why more inclusive regulations have become necessary. Prevalent issues that come to the ombudsman program as complaints include training and qualifications of staff and administrators, medication administration issues, resident agreement/contract issues and discharge issues. Discharge issues are on both sides of the spectrum, facilities keeping residents past when they can adequately provide care for them and facilities discharging inappropriately.

RESPONSE: The department shares these concerns and has tried to adequately address these areas in the proposed rules and the subsequent revisions which will be sent out for second notice.

COMMENT #163: These rules should take into account the size of the facility. Small facilities shouldn't be held to the same standards as much larger ones.

RESPONSE: The department did consider size of the facility but ultimately decided not to develop rules or proposed legislation based on size. The question became whether consumers should be guaranteed the same level of safety in a small facility as they are in a larger facility. As an example, is it acceptable to choke on a piece of meat and not have someone know the Heimlich maneuver just because you are in a small facility?

COMMENT #164: Do not make the proposed changes regarding

assisted living facilities. People want to die in a homelike atmosphere rather than a nursing home.

RESPONSE: The department is unable to respond to this comment because it does not specify why the proposed rules would prevent someone from continuing to live in a personal care facility until their demise.

COMMENT #165: We wish to acknowledge the accomplishments of the department and the committee in drafting these rules. We are sure that it is a relatively thankless task, but feel it will result in an overall improvement of resident care and provider/regulatory relations. Well done.

RESPONSE: The department appreciates your support.

COMMENT #166: That the proposed rules "limit a resident's choice to receive care in the setting and facility they choose".

RESPONSE: The proposed rules do not limit the choice of residents to receive care in the facility and setting they choose. To the contrary, under the proposed rules, residents of personal care facilities have the right to not be discharged or transferred from the facility they have chosen, except under specific circumstances, such as when the needs of the resident exceed the level of care provided by the facility, or such as when a resident substantially interferes with the rights or safety of other residents.

COMMENT #167: That the proposed rules "limit a resident's choice to receive care in the least restrictive environment" which is in opposition to the federal laws mandated in the OBRA Act of 1987.

RESPONSE: "OBRA 1987" is the Omnibus Budget Reconciliation Act of 1987, which provides (in relevant part) for minimum standards of care for people residing in nursing facilities or skilled nursing facilities certified for participation in the Medicare and Medicaid programs. Specifically, the relevant portions of OBRA are 42 USC 1396r and 42 USC 1395i-3. Additionally, these federal code sections are implemented by 42 CFR part 483.

42 USC 1396r provides for the minimum requirements which must be met by a "nursing facility" in order to be certified for participation in the Medicaid program. Similarly, 42 USC 1395i-3 provides for the minimum requirements which must be met by a "skilled nursing facility" in order to be certified for participation in the Medicare program. Both sections address the provision of services to residents, the protection of resident's rights, and the administration of the facility.

42 CFR part 483 provides for the minimum requirements which must be met by "skilled nursing facilities" in order to participate in Medicare under 42 USC 1395i-3, and which must be met by

"nursing facilities" in order to participate in Medicaid under 42 USC 1396r, and further provides a basis for the survey of "skilled nursing facilities" and "nursing facilities" in order to ensure that said minimum requirements are met.

As a result, the requirements of OBRA 1987 do not apply to personal care or assisted living facilities participating in neither Medicare nor Medicaid, which are the type of facilities affected by the proposed rules. That being said, 50-5-1104(1), MCA, extends the rights of residents of skilled nursing facilities participating in Medicare, and the rights of residents of nursing facilities participating in Medicaid, to residents of all Montana long term care facilities, regardless of participation in Medicare or Medicaid, and including facilities licensed as personal care facilities. In other words, residents of Montana personal care facilities are entitled under State law to the same rights as residents of Medicare/Medicaid facilities under OBRA 1987.

The rights to which said residents are entitled under 50-5-1104(1), MCA are as follows:

- o The right to freedom from abuse, mistreatment, and neglect;
- o The right to freedom from physical restraints;
- o The right to privacy;
- o The right to accommodation of medical, physical, psychological, and social needs;
- o The right to participate in resident and family groups;
- o The right to be treated with dignity;
- o The right to exercise self-determination;
- o The right to communicate freely;
- o The right to participate in the review of one's care plan and to be fully informed in advance about any changes in care, treatment, or change of status in the facility;
- o The right to voice grievances without discrimination or reprisal; and
- o The right to not be transferred or discharged without cause, and the right to a hearing to dispute a transfer or discharge.

(See 50-5-1104(1), MCA, and 42 CFR 483.10, 483.12, 483.204 and 483.206.)

All of the resident's rights specified in 42 CFR part 483, and applied to personal care residents by 50-5-1104(1), MCA, are addressed in the proposed rules, and specifically, at Rules IX (ARM 37.106.2815), X (ARM 37.106.2816), XI (ARM 37.106.2817), XII (ARM 37.106.2821), XIII (ARM 37.106.2822), XIV (ARM 37.106.2823), XV (ARM 37.106.2824), XVI (ARM 37.106.2828), XVII (ARM 37.106.2829), XVIII (ARM 37.106.2830) and XIX (ARM 37.106.2831).

What is not included in the resident's rights specified in 42 CFR part 483, and applied to personal care residents by 50-5-1104(1), MCA, is the "right to receive care in the least restrictive environment". However, even if such a right was included, nothing in the proposed rules requires that residents of personal care facilities be placed in a more restrictive environment. To the contrary, the resident's rights provisions of the proposed rules ensure that said residents have a right to remain in their chosen personal care setting except under the limited circumstances stated in the rules, such as when the level of care required by a particular resident exceeds the level of care provided by a particular facility.

COMMENT #168: That the proposed rules "do not support Montana's Resident Rights".

RESPONSE: The proposed rules are supportive of resident's rights. The rights of residents of Montana long term care facilities are specified in the "Montana Long-Term Care Residents' Bill of Rights" (50-5-1101 through 50-5-1107, MCA). Said rights are specifically stated at 50-5-1104, MCA, including incorporation of all rights to which residents of skilled nursing facilities and nursing facilities certified for participation in the Medicare and Medicaid programs are entitled.

Rule XVI (ARM 37.106.2828) specifically requires Montana personal care facilities to comply with the Montana Long-Term Care Residents' Bill of Rights, and addresses further the rights of residents to execute advance directives and to make their own medical care decisions. Furthermore, Rule XV (ARM 37.106.2824) requires compliance with the involuntary transfer or discharge rights to which residents are entitled by 50-5-1107(1), MCA (by incorporation of rights to which residents are entitled under Medicare/Medicaid). As a result, the proposed rules are substantially more protective of resident's rights than the existing rules, which substantially fail to address resident's rights at all.

COMMENT #169: That the proposed rules "discriminate against residents with dementia or Alzheimer's disease".

RESPONSE: The proposed rules do not discriminate against residents suffering from dementia or Alzheimer's disease. To the contrary, Rule XLV (ARM 37.106.2884), by requiring category B facilities which specialize in providing services to persons with severe cognitive impairment to meet additional requirements, provides substantially greater protections to residents suffering from dementia or Alzheimer's disease than to all other residents of personal care facilities.

COMMENT #170: That the proposed rules "are not in compliance and are not supportive of the Fair Housing Act" in that the Act

defines discrimination (in part) as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling".

RESPONSE: The proposed rules do not violate the federal Fair Housing Act (42 USC 3601 3619 and 42 USC 3631, as implemented by 24 CFR parts 100 and 103). The Fair Housing Act prohibits discrimination in housing (or mortgage lending) on the basis of race, national origin, religion, sex, familial status, or handicap. The proposed rules do not discriminate on the basis of any of these protected classes. In fact, said rules specifically provide for the licensure and regulation of personal care facilities, the primary purpose of which is to provide an alternative to a nursing home setting for elderly persons who may be suffering from a handicap within the meaning of the Act.

While it is true that the Fair Housing Act makes it "unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas" (see 24 CFR 100.204), the proposed rules do not violate this requirement, nor do they infringe upon the ability of any personal care facility to meet this requirement. To the contrary, the proposed rules ensure that accommodations are made which enable personal care residents to make use of personal care facilities.

Furthermore, nothing in the Fair Housing Act requires that a personal care facility place a personal care resident at risk by attempting to provide services beyond the capabilities of the facility, nor does the Act require that a personal care facility take extraordinary measures to ensure that a resident may continue to reside in a setting which is no longer appropriate for that resident. The Act requires nothing more than that reasonable accommodations in rules, policies, practices, or services be made, such as that a blind resident with a guide dog must be accommodated by making an exception to a no pets policy.

COMMENT #171: That the proposed rules "do not support the Americans with Disabilities Act".

RESPONSE: The proposed rules do not violate the Americans with Disabilities Act (42 USC 12101 through 12213). The Americans with Disabilities Act (ADA) generally prohibits discrimination against the disabled in employment, public services, public accommodations, and telecommunications. A person is disabled for the purposes of the ADA if that person has a physical or mental impairment that substantially limits one or more major life activities. In other words, a person with a disability is one who suffers from a physical or mental impairment which

prevents or limits the ability of that person to engage in the activities of daily living without assistance, i.e. virtually every person residing in a personal care facility. As a result, with very few exceptions, residents of personal care facilities are most likely persons with disabilities for the purposes of the ADA. Furthermore, a personal care facility would, under most circumstances, qualify as a "public accommodation" for the purposes of the ADA.

As an entity covered by the ADA, a personal care facility would be prohibited from imposing eligibility criteria which would tend to screen out persons with disabilities, unless such screening is necessary for the provision of the services offered by the facility. Additionally, a personal care facility must make reasonable accommodations in policies, practices and procedures if said accommodations are necessary to enable persons with disabilities to access the services offered by the facility, unless the accommodations would fundamentally alter the services offered by the facility.

In other words, a rule requiring a facility to initiate a screening process to ensure that the needs of persons admitted to that facility are within the facility's ability to care for or provide services to that person does not violate the ADA, on the basis that the screening process is necessary to provide the services offered by the facility. The ADA does not require a facility to fundamentally alter the services it normally provides in order to permit a person with a disability to obtain services from that facility. For example, a doctor who specializes in the treatment of burn patients is not prohibited by the ADA from referring a patient with hearing problems to a specialist in that field. Similarly, a personal care facility is not required to provide services it does not normally provide in order to accommodate the needs of an elderly person with (for example) Alzheimer's disease.

The ADA requires nothing more than that an entity which offers goods or services to the public offer the same goods or services to members of the public suffering from a disability, even if the entity must make some reasonable accommodations in order to ensure that a disabled member of the public is able to enjoy the goods or services offered by the entity. What the ADA does not require is that an entity offer services or goods which it does not normally offer simply to meet the needs of a member of the public who also happens to be disabled. On that basis, the proposed rules do not violate the ADA, nor do they place requirements upon personal care facilities which will result in violations of the ADA.

COMMENT #172: That the proposed rules "are being implemented with minimum efforts for due process".

RESPONSE: The Department is currently engaged in the required process for the adoption of administrative rules by a state

agency, which said process is set forth at Title 2, chapter 4 of the Montana Code Annotated (i.e. the Montana Administrative Procedure Act). As part of the required process, the Department has submitted the required notices, has conducted a public hearing, has given the public the opportunity to comment on the proposed rules, both at the public hearing, and in writing, and is currently engaged in the consideration of and the formation of responses to said comments. As such, the Department has provided the level of due process required by law.

COMMENT #173: That the proposed rules discriminate against "larger assisted living facilities" by allowing only five category B beds, which is "the number allowed in smaller facilities".

RESPONSE: The Department has no rulemaking authority to increase the number of category B beds which a facility may operate, regardless of the size of the facility. The limitation on the number of category B beds a facility may operate is set in statute, at 50-5-227, MCA. As a result, only the Montana Legislature may increase the number of category B beds a facility may operate.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State December 16, 2002.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT AND
of ARM 42.4.110; and transfer) TRANSFER AND AMENDMENT
and amendment of ARM 42.15.431)
(42.4.130) and 42.15.432)
(42.4.131) relating to personal)
income tax credits for energy)
conservation)

TO: All Concerned Persons

1. On September 12, 2002, the department published notice of proposed amendment, and transfer and amendment of the above-stated rules relating to personal income tax credits for energy conservation at page 2428 of the 2002 Montana Administrative Register, issue no. 17.

2. A public hearing was held on October 4, 2002, where oral and written comments were received.

3. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the department:

COMMENT NO. 1: The Montana Taxpayers' Association (MonTax) stated that the reference to 15-32-109, MCA, should be added to the implementing section for ARM 42.4.110.

RESPONSE NO. 1: The department agrees and will add the cite to the implementing authority for the rule.

COMMENT NO. 2: MonTax stated that changes are being proposed in ARM 42.15.431 to reflect that the same credit is available whether the structure is residential or commercial, and to clarify that the credit is allowed for certain hot-water, heating, and cooling systems.

Section (3) disqualifies capital investments that are directly used in a "reproduction or manufacturing processor rendering a service to customers." Although the department is not amending this section, MonTax believes this restriction is narrower than the statute contemplates.

RESPONSE No. 2: The department agrees that this section may need further clarification but since new language would be significant, notice to the public of the department's intended action would be necessary. Therefore, the department will not amend this section with this adoption notice. The department will agree to review it further in the near future.

COMMENT NO. 3: MonTax stated that ARM 42.15.431(4) references qualifying hot-water, etc., and it is not necessary

in this rule. The qualifications are set forth in ARM 42.15.432.

RESPONSE NO. 3: The department will amend ARM 42.15.431 to strike the proposed amendment for (4), which makes reference to qualifying hot-water, heating, and cooling systems.

COMMENT NO. 4: MonTax stated that ARM 42.15.432(1)(e), which deals with storm or triple-glazed windows also appears to be narrower than the statutory intent, in particular for existing structures. MonTax suggested the department use broader language such as "windows that result in reduction of energy consumption."

RESPONSE NO. 4: The department will amend ARM 42.15.432 to address this concern.

COMMENT NO. 5: MonTax suggested that the department inform taxpayers (either through rule or on the application form) regarding which agency to contact for questions on qualifying investments. It is not clear if the taxpayer should contact the department of environmental quality or the department of revenue when there are questions or concerns.

RESPONSE NO. 5: Montana Form ENRG-C advises taxpayers to contact the department of revenue customer service center at (406) 444-6900 if they have questions.

4. The department has amended ARM 42.4.110 and transferred and amended ARM 42.115.431 (42.4.130) and 42.15.432 (42.4.131) with the following changes:

42.4.110 DEFINITIONS The following definitions apply to terms used in this sub-chapter:

(1) through (3) remain the same.

(4) "New construction" means construction of, or additions to, buildings, living areas, or attached garages that comply with the established standards of new construction as determined by the building code statutes in Title 50, MCA.

AUTH: Sec. 15-1-201, 15-30-305, 15-32-407, and 15-35-122, MCA

IMP: Sec. 15-24-3001, 15-32-109, 15-32-404, and 15-35-103, MCA

42.15.431 (42.4.130) DEDUCTION OR CREDIT FOR INVESTMENT FOR ENERGY CONSERVATION (1) through (3) same as proposed.

~~(4) A credit is allowed to individuals for the installation of a new domestic hot-water, heating, or cooling system in an existing building only if the new system reduces the waste or dissipation of energy, or reduces the amount of energy required.~~

(5) remains as proposed, but is renumbered (4).

AUTH: Sec. 15-32-105, MCA

IMP: Sec. 15-32-103, 15-32-105 and 15-32-109, MCA

42.15.432 (42.4.131) DETERMINATION OF CAPITAL INVESTMENT FOR ENERGY CONSERVATION (1) through (1)(d) remain as proposed.

(e) ~~storm or triple glazed~~ windows THAT RESULT IN REDUCTION OF ENERGY CONSUMPTION;

(f) through (2) remain as proposed.

AUTH: Sec. 15-32-105, MCA

IMP: Sec. 15-32-105 and 15-32-109, MCA

5. The department has amended ARM 42.4.110 and transferred and amended ARM 42.15.431 (42.4.130) and 42.15.432 (42.4.131) with the amendments listed above.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson

CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme

KURT G. ALME
Director of Revenue

Certified to Secretary of State December 16, 2002

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption)
of New Rules I (42.9.102), II)
(42.9.103), III (42.9.301), IV)
(42.9.401), V (42.9.501), VI)
(42.9.510), VII (42.9.520), VIII)
(42.9.530), IX (42.9.540), and X)
(42.9.104); amendment of ARM)
42.2.304, 42.15.301, 42.15.321,)
42.15.322, 42.16.1201, 42.26.202,)
42.26.209, 42.26.211, 42.26.228,)
and 42.26.229; transfer and)
amendment of ARM 42.15.307)
(42.9.402), 42.15.311 (42.17.122),)
42.15.701 (42.9.101), 42.15.702)
(42.9.201), 42.15.704 (42.9.202),)
and 42.15.705 (42.9.203); and)
repeal of ARM 42.15.101, 42.15.202,))
42.15.203, 42.15.212, 42.15.304,)
42.15.306, 42.15.703, 42.16.1202,)
42.16.1203, 42.16.1204, 42.16.1205,))
42.16.1206, 42.16.1207, 42.16.1208,))
42.16.1209, 42.16.1210, 42.16.1211,))
42.16.1212, 42.16.1213, 42.16.1214,))
42.16.1215, 42.16.1216, 42.16.1217,))
42.16.1218, 42.16.1219, 42.16.1220,))
42.16.1221, 42.16.1222, 42.16.1223,))
42.16.1224, 42.16.1225, 42.16.1226,))
42.16.1227, 42.16.1228, 42.16.1229,))
42.23.201, 42.24.102, 42.24.121 and)
42.24.123 relating to pass-through)
entities)

TO: All Concerned Persons

1. On October 31, 2002, the department published notice of proposed adoption of New Rule I (42.9.102), II (42.9.103), III (42.9.301), IV (42.9.401), V (42.9.501), VI (42.9.510), VII (42.9.520), VIII (42.9.530), IX (42.9.540), and X (42.9.104); amendment of ARM 42.2.304, 42.15.301, 42.15.321, 42.15.322, 42.16.1201, 42.26.202, 42.26.209, 42.26.211, 42.26.228, and 42.26.229; amendment and transfer of ARM 42.15.307 (42.9.402), 42.15.311 (42.17.122), 42.15.701 (42.9.101), 42.15.702 (42.9.201), 42.15.704 (42.9.202), and 42.15.705 (42.9.203); and repeal of ARM 42.15.101, 42.15.202, 42.15.203, 42.15.212, 42.15.304, 42.15.306, 42.15.703, 42.16.1202, 42.16.1203, 42.16.1204, 42.16.1205, 42.16.1206, 42.16.1207, 42.16.1208, 42.16.1209, 42.16.1210, 42.16.1211, 42.16.1212, 42.16.1213, 42.16.1214, 42.16.1215, 42.16.1216, 42.16.1217, 42.16.1218, 42.16.1219, 42.16.1220, 42.16.1221, 42.16.1222, 42.16.1223, 42.16.1224, 42.16.1225, 42.16.1226, 42.16.1227, 42.16.1228,

42.16.1229, 42.23.201, 42.24.102, 42.24.121, and 42.24.123 relating to pass-through entities at page 2988 of the 2002 Montana Administrative Register, issue no. 20.

2. A public hearing was held on November 26, 2002, to consider the proposed adoption, amendment, amendment and transfer and repeal. Oral and written comments were received.

3. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the department:

COMMENT NO. 1: Bob Turner, member of the Montana Society of CPA's Taxation Committee, stated that according to New Rules III, IV and V a late-pay penalty may be assessed if all the information is not on partnership and S corporation returns. If a return is received but incomplete a penalty will be assessed. That is different from what the department currently does with individual income tax returns. Returns that are incomplete are not assessed a penalty. The missing information is just sought from the taxpayer. Under the statutes, individual income tax return information is required. The same statutes apply to these rules. Mr. Turner questioned how the department could assess a penalty for pass-through entities and not individuals, even though the same information is required on the individual income tax return. That is inconsistent.

Mr. Turner further questioned what criteria would be followed in order to make the determination that a penalty should be applied in each case. Mr. Turner indicated that this practice treats the taxpayers differently.

RESPONSE NO. 1: The principle purpose for these information returns is to obtain accurate records of the owners, including their names, addresses, and social security numbers, all of which are statutorily required. These rules treat incomplete returns as non-filed returns. The penalty is a mechanism to ensure compliance and it is statutorily required as shown in 15-30-1102, MCA. With regard to the individual income tax situation, there is a tax liability and a penalty is assessed in relationship to a tax owed.

With information returns there is no tax owed. Therefore, the only enforcement mechanism available to ensure owner information is reported is to impose the penalty for incomplete returns. The department does have the authority to waive the penalty and in the case of non-intentional omission, we would fully expect to waive the penalty. But unlike returns where there is a tax owed to which a penalty can be attached, we do not have that situation with information returns.

COMMENT NO. 2: In New Rule III(3)(c)(iii) and (iv), and New Rule IV(3)(c)(iii) and (iv), the department addresses pro rata share of Montana source income. These rules also address each shareholder and partner's separate Montana source income. Mr. Turner questioned whether these two sections were asking for the same thing, and if so, couldn't they just be combined.

Mr. Jack Dugan, CPA with the firm Holmes and Turner, stated that an extension was not required for a 2001 return and in 2003 a federal extension will also extend Montana. A federal extension should also extend Montana for 2002 and a separate form not be required for one year.

Mr. Dugan suggested that New Rule III(3) should end after ". . . approved for filing the federal return."

Mr. Dugan stated that according to New Rule IV(3) an extension was automatic for six months in 2001 and in 2003 a federal extension will also extend Montana. Mr. Dugan asked why the automatic extension was being removed and why would a separate form be required for one year.

Mr. Dugan suggested the department split New Rule IV(3) the same as suggested for New Rule III(3).

RESPONSE NO. 2: The difference in sections (3)(c)(iii) and (iv) is that one represents Montana source income and the other represents total worldwide source income as clarified in 15-30-1102, MCA.

The department agrees with Mr. Turner that there is a typographical error in New Rule IV(3)(c)(iv) and the department will amend the rule to remove the reference to "Montana" in that section to read: "each shareholder's pro rata share of separately and non-separately stated income gain, loss, deduction, or credit from all sources."

The department does not agree that these two subsections should be combined.

Regarding Mr. Dugan's question about why an extension is required for 2002, under temporary legislation that applies only to the 2002 tax year, the penalty for failure to withhold cannot be assessed until after the department sends notice of the withholding requirement. Unless an extension request is filed by the pass-through entity, the department may have no notice that the entity exists and has Montana source income, so no way of assuring that the entity should receive notice of the withholding requirement.

The department agrees that it would clarify the rule to separate proposed section (3) for both New Rule III and IV. See the amendments below.

COMMENT NO. 3: ARM 42.2.304 - Mr. Turner stated that new subsection (2) for this rule defines an "accounting period" but for income tax purposes it is the same as the federal accounting period. This definition seems to allow the taxpayer to elect a fiscal basis under this definition. Montana statutes relating to adjusted gross income tie Montana to the federal accounting period, so for individuals the accounting period is the same as federal.

Mr. Dugan questioned whether a limited liability company, as defined in subsection (11), is the limited liability company that elects to be taxed as a C corporation.

Mr. Dugan stated that subsection (15) should be amended to reference ". . . for federal 'income' tax purposes." He also suggested the word "member" should replace "owner" regarding a

limited liability company.

Mr. Turner questioned why the department was defining Montana source income in subsection (29) because it is defined in statute.

Mr. Dugan stated that the last sentence of subsection (29) is extremely vague and incorrect. Title 15, chapter 31, part 3, MCA, and ARM 42.16.1201 through 42.16.1205 define Montana source income.

Mr. Dugan questioned whether the due date in (34) should be changed to read "the 15th day of the fifth month."

RESPONSE NO. 3: The department agrees with Mr. Turner regarding the definition of "annual accounting period" as shown in (2), and will amend it to indicate the accounting period is that period used for federal income tax purposes. See the amendment below.

Mr. Dugan's statement regarding (11) is correct.

Department agrees with Mr. Dugan regarding the amendment to (15) and has amended the rule as shown below.

With regard to Mr. Turner's question about "Montana source income" being defined in (29) when it is already in the statute, the department chose to include this term in the rule in order to have a comprehensive format of the definitions used for the pass-through entity rules in one location, even though some of them may also be found in statute.

With regard to Mr. Dugan's comment concerning subsection (29), the department disagrees. In the case of multi-state corporations and business entities, the multi-state "division of income provisions" are applicable and not inconsistent. The division of income provisions of the Multi-state Tax Compact, are apart and remain different from the definition of Montana source income when used to determine information return filing requirements. See 15-30-101, MCA. ARM 42.16.1202 through 42.16.1205 are being repealed because they are duplicated elsewhere in Title 42, chapter 26. ARM 42.16.1201 references the rules in chapter 26 that apply to the Multi-state Tax Compact. Some entities fall under the Multi-state Tax Compact while others do not.

COMMENT NO. 4: Mr. Turner offered comments concerning ARM 42.15.301 and stated that the filing requirements for a non-resident as shown under (1)(c) are that "a nonresident must file a return if the person's gross income from all sources is more than \$1,500 adjusted for the cost of living plus the value of exemptions they are entitled to and they have any Montana source income." What this means is that any nonresident who has income meeting the filing thresholds of an individual plus \$1 has to file a Montana tax return. He stated that this is unnecessary and creates an administrative burden to require filing returns that will not generate a tax payment. Also, there is a burden on the taxpayer so he suggested the department consider a threshold for nonresidents.

Mr. Dugan stated that (1)(a) states: ". . . gross income for the taxable year from all sources . . ." The instructions

for Form 2 state the filer must file the federal gross income . . ." Why a discrepancy?

Mr. Dugan suggested an amendment to (1)(c), suggesting that the sentence end after ". . . is not required to file an individual income tax return." (The nonresident has consented if the pass-through entity has filed a composite return.)

Mr. Dugan questioned why there was a difference in (1)(f) which refers only to "income" from all sources. The other entity requirements refer to "gross income" from all sources.

Mr. Dugan stated that the text in (2) was incorrect because if the nonresident's pass-through entity has filed a composite return (including the nonresident) the income would not be included.

RESPONSE NO. 4: The issue of requiring nonresidents to file income tax returns even though their Montana source income does not exceed the personal exemption and standard deduction threshold was discussed during the testimony before the 2001 legislature and it was the legislative choice to require returns for nonresidents without regard to filing thresholds. While the department can understand Mr. Turner's concerns, the department believes the position of the legislature was clear. Inasmuch as the legislature rejected setting a threshold for nonresidents who have Montana income from a pass-through entity, the department may not attempt to develop a threshold through administrative rules.

The department agrees with Mr. Dugan that there is a discrepancy between (1)(a) of this rule and Form 2 regarding the reference to "federal" on the Form 2, and will remove it from the form.

The department agrees with the recommendation to amend (1)(c). The department has struck the remainder of the sentence as recommended by Mr. Dugan because the language is redundant.

The department agrees with Mr. Dugan's observation of a discrepancy in (1)(f) where the term "gross" was inadvertently omitted. The department will amend the rule to add "gross" before "income" in this section. See below for the amendment.

The department believes moving a portion of (1)(c) to (2) will address the concerns raised by Mr. Dugan about the text in (2) being incorrect. An individual return is not required if a composite return is filed. An individual cannot file both an individual and a composite return.

COMMENT NO. 5: Mr. Turner stated that he disagreed with the proposed amendment to ARM 42.15.307 because it was an adjustment to Montana gross income. Mr. Turner stated that the rule applies to when a capital gain is taxed and that tax flow through is reduced by the amount of capital gain. The original rule was developed to try to make Montana whole when they add back that portion of capital gain but what this amendment does is add the tax back. What actually should be added back to Montana adjusted gross income is the capital gain income, and it should be on the S corporation and not on a regular corporation.

Mr. Dugan stated that the amendment to ARM 42.15.307(1)(a)

is not applicable and the amendment to ARM 42.15.307(1)(b) is included by 42.15.307(1)(c). He also stated that the name should be changed to "Adjustments to Montana Adjusted Gross Income." A reduction must be added to reflect 15-30-111(4), MCA. This reduction also applies to partnerships.

RESPONSE NO. 5: The department agrees with Mr. Turner, inasmuch as we are not addressing the "add-back of the capital gain" to Montana adjusted gross income. We are only addressing the add-back for federal taxes paid by the entity. The only amendments to the rule are re-earmarking the sections of the rule. Section 15-30-111(1)(c), MCA, applies to S corporations and was not changed by HB 143 or the amendments of this rule. The department has further determined that it is not appropriate to transfer this rule to new chapter nine dealing with pass-through entities.

COMMENT NO. 6: Mr. Turner asked why the department is proposing to repeal ARM 42.15.306. He further questioned whether the purpose of this rule was to not allow a pass-through loss for a partnership or S corporation on an individual income tax return if the pass-through entity had not filed.

Mr. Turner stated that if a partnership return has a loss and that flows through the individual income tax loss, that loss is allowed on the individual income tax return. This refers to a present year loss. Under this rule, if that partnership has not filed with the department that can automatically be disallowed. By repealing this rule, the department is stating that the department will now allow that pass-through loss.

Mr. Turner stated that he felt that the department had authority to retain this rule under its general rulemaking authority in Title 15, chapter 30, MCA. He stated that this rule is an enforcement tool for the department for individual income tax returns.

RESPONSE NO. 6: The department repealed ARM 42.15.306 because the implementing statute, 15-31-202, MCA, was repealed and 15-30-133, MCA, was amended to provide an entity level penalty to force the entity to file a return.

COMMENT NO. 7: Mr. Turner stated that New Rule II(2) deals with the calculation of the late file penalties for pass-through entities. This proposed rule reiterates 15-30-112, MCA. If this language is in statute, the department should not be proposing it again in rule.

Mr. Dugan stated that section (2) should not be imposed earlier than for tax years beginning after January 1, 2003, due to the late timing of these proposed rules.

RESPONSE NO. 7: The department is implementing 15-30-1102(4)(d), MCA, with this rule. The department does not believe that the rule reiterates the law. It provides examples to aid taxpayers and tax preparers when dealing with what would constitute grounds for late-file penalties.

With regard to Mr. Dugan's comment, the statute that implements this penalty was enacted in 2001 so the adoption date of the rules does not change the effectiveness of the penalty, which is directed by statute.

COMMENT NO. 8: Mr. Turner provided testimony concerning New Rule V, stating if there is a one-member LLC and they file a schedule C with that person's individual income tax return, under this rule they will be required to file the same information twice - once as a pass-through entity under this rule and once as a schedule C on the person's individual income tax return. This is a burden on the taxpayer and the federal government does not require two filings. In addition, when HB 143 was proposed, the department was asked this question and stated that it would not require this. Mr. Turner asked if the department had changed its policy. Mr. Turner stated that he did not believe this rule was needed.

RESPONSE NO. 8: The department will amend New Rule V (42.9.501) to address Mr. Turner's concerns clarifying that a single-member LLC that is a disregarded entity is not required to file an information return when the single member owner is a full-year Montana resident individual.

COMMENT NO. 9: Mr. Dugan questioned the new requirement of New Rule III(3)(b), which requires a copy of the federal return. This is a new requirement requiring considerable copying and mailing costs. He further asked if the department had a reason for this requirement.

RESPONSE NO. 9: The department understands the concern for the added copying and mailing costs. However, this requirement is a legislative requirement as provided in 15-30-1102(3) and (4), MCA, and is only expanded by this rule.

COMMENT NO. 10: Mr. Dugan stated that the language of New Rule X(1) was unclear.

Further, New Rule X(1)(b) refers to a form and he stated that the department must make this form available to enable preparers to get the form signed in a timely manner. The form should only have to be filed with an initial return or when a nonresident is added, and not on an annual basis. He suggested the department consider allowing the pass-through entity to elect from two options: 1 - file a composite return; or 2 - file a Montana nonresident income tax agreement for each nonresident.

Mr. Dugan stated the requirements of New Rule X(1)(c), (2), and (3) requiring remittances on behalf of certain non-residents are not practical for a pass-through entity, and are not included in 15-30-1112, MCA, and should be deleted.

RESPONSE NO. 10: The department has amended New Rule X(1) to further clarify it. See amendments below. With regard to (1)(b), the form is available and may be obtained by contacting the department. The department is adding a new (2) to the rule

to address the concerns expressed by Mr. Dugan.

The department disagrees with Mr. Dugan that the requirements of New Rule X (42.9.104)(1)(c), (2) and (3) are not practical and should be deleted. These sections of the rule implement 15-30-1113, MCA, which requires payment, rather than 15-30-1112, MCA, as stated by Mr. Dugan.

COMMENT NO. 11: Mr. Dugan stated that the amendment shown in ARM 42.15.322(4) does not consider community property allocation of income.

Mr. Dugan further stated that the amendment in (5) of this rule does not consider community property allocation of income. The last sentence stating the allocated amount cannot exceed the gross income derived from a sole proprietorship does not agree with the instructions for spousal allocation included with the department's Form 2.

Mr. Dugan stated that regarding the amendment of (7) for this rule, 15-30-105, MCA, states the tax is imposed on a nonresident as if the nonresident were a resident. This proposed rule restricts the statute and is invalid.

RESPONSE NO. 11: The department appreciates Mr. Dugan's comment that the rule doesn't address community property. As this issue generally affects individual income tax, the department believes that the subject should be referred to the team that is currently working on revising the personal income tax rules, found in chapters 15 and 16.

Multiple filing status is not allowed on Montana Form 2. Therefore, separate returns must be filed by spouses with different residence status. Section 15-30-105, MCA, addresses the method of computing a non-resident's tax, not the return filing requirements.

COMMENT NO. 12: Mr. Dugan stated that ARM 42.26.229 is for corporate apportionment factor under the Montana corporation license tax rules. It is only applicable for allocating pass-through income to a C corporation partner or a C corporation member. ARM 42.16.1201 through 42.16.1205 relate to nonresident allocation for business and nonbusiness income for individuals. Title 15, chapter 31, part 3, MCA, also applies. Mr. Dugan stated that this rule is not applicable and should not be included with these proposed changes.

RESPONSE NO. 12: The department disagrees with the comment that amendments to ARM 42.26.229 should not be included as part of these amendments. The applicable department rules are being amended to take the 2001 changes to pass-through entity treatment into account, including ARM 42.26.229. ARM 42.16.1201 through 42.16.1205 are being repealed and the corporation allocation and apportionment rules incorporated by reference. The allocation and apportionment rules apply to all multi-state business entities as provided in Title 15, chapter 1, part 1, MCA.

COMMENT NO. 13: Mr. Dugan stated that the amendments to ARM 42.15.702(2) requiring entities to retain powers of attorney are burdensome and unnecessary. The filing of a composite return is sufficient evidence of authorization.

RESPONSE NO. 13: The power of attorney retention requirement is provided by statute. Section 15-30-1112(4)(e), MCA, requires entities to retain powers of attorney.

COMMENT NO. 14: Mr. Dugan stated that ARM 42.15.705(2)(a) regarding the participant's share of the entity's income from all sources as determined for federal income tax purposes should be changed to include Montana adjustments to federal income. He also requested the department review the comment proposed for ARM 42.15.307 in Comment No. 5.

Mr. Dugan suggested that (2)(b) be changed to include Montana adjustments to federal income.

Mr. Dugan stated that the reference shown in (3) for quarterly payments must be required under 15-31-502, MCA. He further stated that no penalty should be assessed for the first year a pass-through entity is subject to the tax.

RESPONSE NO. 14: As provided in 15-30-1112(2)(ii), MCA, the basis for computing the composite tax is the entity's income from all sources for federal income tax purposes, without Montana adjustments. The basis for the composite tax is different from the basis for income tax, which takes the owner's world-wide income into account.

COMMENT NO. 15: Mr. Dugan stated that the example shown in ARM 42.15.705 should reflect that the \$60,000 is income as adjusted under ARM 42.15.307 including any reductions. The \$20,000 should also be Montana source income as adjusted by ARM 42.15.307 including any reductions.

RESPONSE NO. 15: As stated in Response No. 14, there are no Montana adjustments to federal income when computing the composite tax.

COMMENT NO. 16: Mr. Dugan questioned whether the amendment to ARM 42.15.311 now requires payments to retirement plans to be subject to reporting. He stated that nothing changed except the address and all the additions are misleading, unsupported, and unnecessary. The reasonable necessity states that pass-through entity information returns can also be "information" returns. The pass-through "information" returns are tax returns and will be filed with the tax return rather than as a separate "information" return.

RESPONSE NO. 16: The information returns required for pass-through entities have no relationship to reporting of dividends interest, etc. The amendments to ARM 42.15.311 apply only to reporting dividends and interest. This rule was amended only to avoid the confusion of using the same term "information return",

in different contexts.

4. Based on the comments received and further review by the department, the department further amends New Rules III (42.9.301), IV (42.9.401), V (42.9.501), and X (42.9.104); and ARM 42.2.304 and 42.15.301, with the following changes:

NEW RULE III (42.9.301) PASS-THROUGH ENTITY INFORMATION RETURNS FOR PARTNERSHIPS (1) and (2) remain as proposed.

(3) For tax years beginning before January 1, 2003, the partnership must file a Pass-through Entity Extension Form PT-EXT to extend the filing date. For tax years beginning after December 31, 2002, approval of an extension to file the partnership's federal Return of Partnership Income or federal Return of Income for Electing Large Partnerships automatically extends the time for filing the Montana return to the date approved for filing the federal return.

(4) A partnership required to file a Montana partnership information return is subject to a late-filing penalty if:

(a) the Montana partnership information return is not filed by the due date (including extensions);

(b) a copy of the partnership's federal partnership return is not filed with the Montana partnership information return; or

(c) a return is filed that does not include all of the following information:

(i) name, address, and social security or federal identification number of each partner;

(ii) the partnership's Montana source income;

(iii) each partner's distributive share of Montana source income, gain, loss, deduction, or credit or items of income, gain, loss, deduction, or credit; and

(iv) each partner's distributive share of income, gain, loss, deduction, or credit, or item of income, gain, loss, deduction, or credit from all sources.

AUTH: Sec. 15-1-201, 15-30-305, 15-30-1102, and 15-31-501, MCA

IMP: Sec. 15-30-142, 15-30-143, 15-30-1102, 15-30-1111, 15-30-1112, 15-31-101, and 15-31-111, MCA

NEW RULE IV (42.9.401) PASS-THROUGH ENTITY INFORMATION RETURNS FOR S CORPORATIONS (1) and (2) remain as proposed.

(3) For tax years beginning before January 1, 2003, the S corporation must file a Pass-through Entity Extension Form PT-EXT to extend the filing date. For tax years beginning after December 31, 2002, approval of an extension to file the S corporation's federal income tax return for an S corporation automatically extends the time for filing the Montana return to the date approved for filing the federal return.

(4) An S corporation required to file a Montana S corporation information return is subject to a late filing penalty if:

(a) the Montana S corporation information return is not filed by the due date (including extensions);

(b) a copy of the S corporation's federal return is not

filed with the Montana S corporation information return; or
(c) a return is filed that does not include the following information:

(i) name, address, and social security or federal identification number of each shareholder;

(ii) the S corporation's Montana source income;

(iii) each shareholder's pro-rata share of separately and non-separately stated Montana source income, gain, loss, deduction, or credit, or item of income, gain, loss, deduction, or credit; and

(iv) each shareholder's pro-rata share of separately and non-separately stated Montana income, gain, loss, deduction, or credit, or item of income, gain, loss, deduction, or credit from all sources.

AUTH: Sec. 15-1-201, 15-30-305, 15-30-1102, and 15-31-501, MCA

IMP: Sec. 15-30-142, 15-30-143, 15-30-1102, 15-30-1111, 15-30-1112, 15-31-101, and 15-31-111, MCA

NEW RULE V (42.9.501) PASS-THROUGH ENTITY INFORMATION RETURNS FOR SINGLE-MEMBER LLC TREATED AS DISREGARDED ENTITY

(1) Any single-member limited liability company (LLC) treated as a disregarded entity that has Montana source income, whether formed in Montana or in another state or country, must file a Montana Disregarded Entity Information Return, Form DER-1, as provided in this rule UNLESS THE SOLE MEMBER IS AN INDIVIDUAL WHO HAS BEEN A FULL-YEAR MONTANA RESIDENT DURING THE APPLICABLE REPORTING PERIOD.

(2) through (13)(v) remain as proposed.

AUTH: Sec. 15-1-201, 15-30-305, 15-30-1102, and 15-31-501, MCA

IMP: Sec. 15-30-142, 15-30-143, 15-30-1102, 15-30-1111, 15-30-1112, 15-31-101, and 15-31-111, MCA

NEW RULE X (42.9.104) CONSENT, COMPOSITE RETURN, OR WITHHOLDING FOR NONRESIDENT INDIVIDUAL PARTNERS, SHAREHOLDERS, AND SINGLE-MEMBER LLC MEMBERS

~~(1) A Ppartnerships that have one or more nonresident individual partners, S corporations that have one or more nonresident individual shareholders, and single-member LLCs with ONE OR MORE nonresident individual members OWNERS, during any part of the tax year for which an information return is required by this chapter must, for each nonresident individual:~~

(a) file a composite return as provided in ARM 42.9.202 and include the nonresident individual in the filing;

(b) obtain from the nonresident individual and file with its information return the individual's agreement to timely file a Montana individual income tax return, to timely pay tax due, and to be subject to the state's tax collection jurisdiction on the Montana Nonresident Income Tax Agreement, Form PT-CON; or

(c) remit an amount on the individual's account, determined as provided in (2), with:

(i) Statement of Montana Income Tax Withheld for Nonresident Individual, Form PT-WH; and

(ii) Nonresident Individual Income Tax Estimated Payments Transmittal Document, Form PT-HWHREM.

(2) THE PASS-THROUGH ENTITY IS NOT REQUIRED TO ATTACH NEW AGREEMENTS EACH YEAR, BUT MUST ATTACH A CURRENTLY EFFECTIVE AGREEMENT FOR EACH NEW NONRESIDENT OWNER.

(3) The amount that must be remitted by the due date described in ~~(3)~~ (4) is the highest marginal rate in effect under 15-30-103, MCA, multiplied by the share of Montana source income of the nonresident individual reflected on the pass-through entity's information return.

~~(3)~~(4) The due date for the remittance and transmittal documents described in (1)(c) is different for tax years beginning before January 1, 2003, than it is for later tax years.

(a) For an entity's tax year beginning before January 1, 2003, the due date is the later of 180 days after the due date (including extensions) for filing its information return or the date the department sends it notice of the requirement to withhold and liability for penalties for not remitting the withholding amount.

(b) For tax years beginning after December 31, 2002, the due date is the due date of the entity's information return.

AUTH: 15-30-305 and 15-30-1112, MCA

IMP: 15-30-1113, MCA

42.2.304 DEFINITIONS The terms used by the department are, in great part, defined in Titles 15, 16, 39, and 72, MCA. In addition to these statutory definitions, the following definitions apply to ARM Title 42, unless context of a particular chapter or rule provides otherwise:

(1) remains as proposed.

(2) "Annual accounting period" means ~~the calendar year unless the taxpayer elects to report on the basis of a fiscal year ending the last day of any month other than December. The accounting period for purposes of the Montana corporation license tax will be the same as that used for federal income tax purposes~~ THE ACCOUNTING PERIOD USED FOR FEDERAL INCOME TAX PURPOSES.

(3) through (13) remain as proposed.

(14) "Domiciled" means ~~a person who is~~ HAVING a resident of RESIDENCE IN the state of Montana as stated in 1-1-215, MCA.

(15) "Disregarded entity" means a business entity that is disregarded as an entity separate from its owner(s) for federal INCOME tax purposes. The term includes a limited liability company with one owner, a qualified subchapter S subsidiary not treated as a separate corporation, and a partnership, syndicate, group, pool, joint venture, or other unincorporated organization electing under IRC 761 to be excluded from application of partnership tax rules. A corporation is not a disregarded entity by virtue of being included in a federal consolidated return.

(16) through (33) remain as proposed.

(34) "Original return" means ~~a THE return that is due on the 15th day of the fourth month after the close of the~~

~~taxpayer's tax year for an individual, or on the 15th day of the third month for a corporation~~ REQUIRED TO BE FILED ON OR BEFORE THE DUE DATE.

(35) through (53) remain as proposed.

AUTH: Sec. 15-1-201, 15-30-305, 15-31-501, 16-1-303, 16-10-104, and 16-11-103, MCA

IMP: Sec. 15-1-102, 15-1-601, 15-30-101, 15-30-105, 15-30-131, 15-30-1101, 15-30-1102, 15-30-1111, 15-30-1112, 15-30-1113, 15-30-1121, and 15-31-101, and Title 15, chapter 31, part 3, MCA

42.15.301 WHO MUST FILE INDIVIDUAL INCOME TAX RETURNS

(1) The following individuals must file an individual income tax return:

(a) and (b) remain as proposed.

(c) Every nonresident who is a single person, and every nonresident who is a married person who does not elect or, as provided in ARM 42.15.321, is not allowed to elect, to file a joint return with a spouse, must file a return if the person's gross income from all sources is more than \$1,500, adjusted as provided in (3), plus the value of the exemptions the person is entitled to for age 65 or blindness, and they have any Montana source income. ~~A nonresident whose only Montana source income for the tax year is from one or more partnerships or S corporations, each of which has elected to file a composite return and pay a composite tax on behalf of consenting participants, is not required to file an individual income tax return if the nonresident consents to being included in the composite return of each of the partnerships and S corporations. A nonresident who has Montana source income from a partnership or S corporation who does not elect to file a composite return or who has any other Montana source income (for example, wages from employment in Montana or rental income from property located in Montana), is required to file a Montana individual income tax return if the gross income from all sources, adjusted as provided in this rule, exceeds the applicable limit.~~

(d) and (e) remain as proposed.

(f) The estate of a decedent who was a nonresident must file a return if its GROSS income from all sources exceeds its exemption allowance, and the estate has any Montana source income.

(g) and (h) remain as proposed.

(2) A nonresident's distributive share of a pass-through entity's Montana source income is included in determining a nonresident's obligation to file a Montana individual income tax return. A NONRESIDENT WHOSE ONLY MONTANA SOURCE INCOME FOR THE TAX YEAR IS FROM ONE OR MORE PARTNERSHIPS OR S CORPORATIONS, EACH OF WHICH HAS ELECTED TO FILE A COMPOSITE RETURN AND PAY A COMPOSITE TAX ON BEHALF OF CONSENTING PARTICIPANTS, IS NOT REQUIRED TO FILE AN INDIVIDUAL INCOME TAX RETURN. A NONRESIDENT WHO HAS MONTANA SOURCE INCOME FROM A PARTNERSHIP OR S CORPORATION WHO DOES NOT ELECT TO FILE A COMPOSITE RETURN OR WHO HAS ANY OTHER MONTANA SOURCE INCOME (FOR EXAMPLE, WAGES FROM EMPLOYMENT IN MONTANA OR RENTAL INCOME FROM PROPERTY LOCATED IN MONTANA), IS REQUIRED TO FILE A MONTANA INDIVIDUAL INCOME TAX

RETURN IF THE GROSS INCOME FROM ALL SOURCES, ADJUSTED AS PROVIDED IN THIS RULE, EXCEEDS THE APPLICABLE LIMIT.

(3) remains as proposed.

AUTH: Sec. 15-1-201, 15-30-305, and 15-31-501, MCA

IMP: Sec. 15-30-142, and 15-30-143, 15-30-1102, 15-30-1111, and 15-30-1112, MCA

5. Therefore, the department adopts New Rules I (42.9.102), II (42.9.103), VI (42.9.510), VII (42.9.520), VIII (42.9.530), and IX (42.9.540); amends ARM 42.15.321, 42.15.322, 42.16.1201, 42.26.202, 42.26.209, 42.26.211, 42.26.228, and 42.26.229; transfers and amends ARM 42.15.307 (42.9.402), 42.15.311 (42.17.122), 42.15.701 (42.9.101), 42.15.702 (42.9.201), 42.15.704 (42.9.202), and 42.15.705 (42.9.203); and repeals ARM 42.15.101, 42.15.202, 42.15.203, 42.15.212, 42.15.304, 42.15.306, 42.15.703, 42.16.1202, 42.16.1203, 42.16.1204, 42.16.1205, 42.16.1206, 42.16.1207, 42.16.1208, 42.16.1209, 42.16.1210, 42.16.1211, 42.16.1212, 42.16.1213, 42.16.1214, 42.16.1215, 42.16.1216, 42.16.1217, 42.16.1218, 42.16.1219, 42.16.1220, 42.16.1221, 42.16.1222, 42.16.1223, 42.16.1224, 42.16.1225, 42.16.1226, 42.16.1227, 42.16.1228, 42.16.1229, 42.23.201, 42.24.102, 42.24.121, and 42.24.123 as proposed; and adopts New Rules III (42.9.301), IV (42.9.401), V (42.9.501), and X (42.9.104); and amends ARM 42.2.304 and 42.15.301 with the additional amendments listed above.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson

CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme

KURT G. ALME
Director of Revenue

Certified to Secretary of State December 16, 2002

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 42.15.514; and repeal) AND REPEAL
of ARM 42.15.517 relating to)
charitable endowment credits)
made by taxpayers)

TO: All Concerned Persons

1. On October 31, 2002, the department published notice of proposed amendment of ARM 42.15.514; and repeal of ARM 42.15.517 relating to charitable endowment credits made by taxpayers at page 2983 of the 2002 Montana Administrative Register, issue no. 20.

2. A public hearing was held on November 26, 2002, to consider the proposed amendment and repeal. No one appeared to testify and no written comments were received.

3. The department has amended ARM 42.15.514 and repealed ARM 42.15.517 as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State December 16, 2002

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION, AMENDMENT,
of New Rules I (42.20.110) and) AND REPEAL
II (42.19.601); amendment of ARM)
42.20.101, 42.20.102, 42.20.103,))
42.20.105, 42.20.106, 42.20.107,))
42.20.108, 42.20.109, 42.20.201,))
42.20.203, 42.20.204, 42.20.205,))
42.20.301, 42.20.302, 42.20.303,))
42.20.305, 42.20.432, 42.20.454,))
and 42.20.455; and repeal of ARM)
42.20.104 and 42.20.136 relating)
to valuation of real property)

TO: All Concerned Persons

1. On September 12, 2002, the department published notice of proposed adoption, amendment, and repeal of the above-stated rules relating to valuation of real property at page 2388 of the 2002 Montana Administrative Register, issue no. 17.

2. A public hearing was held on October 8, 2002, to consider the proposed adoption, amendment, and repeal. Oral and written comments were received.

3. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the department:

COMMENT NO. 1: MonTax suggested the department incorporate New Rule I with existing rule 42.20.103. They believe that New Rule I and the existing rule should be combined. Sections 15-24-1501 and 15-24-1502, MCA, are similar, except one has a requirement of a 2 1/2% increase in value while the other has a 5% threshold and a six-month, non-operating requirement. There is also some difference as to the number of mills that may be excluded, but that is a local issue that could be clarified on the application form.

RESPONSE NO. 1: The department rejects the suggestion. While much of the language in New Rule I and existing rule 42.20.103 is identical, the rules are intended to target different properties. The benefits provided by the two rules are different, as are the levies to which the respective benefits are applied. The department has developed two separate application forms for each of the two benefits. In the department's view, the implementation of the suggestion would cause more confusion.

COMMENT NO. 2: MonTax stated that New Rule II proposes to send the assessment notice to the owner whose surname appears first, alphabetically, on the tax record in cases of multiple

ownerships. They would like to be assured the parties involved in earlier discussions of the notification process for undivided interests have agreed to this proposal.

RESPONSE NO. 2: The wording of this rule has been amended, reviewed, and given approval by the primary sponsor of the bill that created the notification requirements for the department. The department is confident the parties involved in the earlier discussions concerning the notification process for undivided interests are in agreement with the wording of this rule.

COMMENT NO. 3: MonTax provided comments regarding ARM 42.20.101, stating that they were not sure why the department was proposing this rule, since cost cannot be used and the department has historically used comparable sales.

RESPONSE NO. 3: This rule addresses the valuation of city and town lots and improvements. It is not specific to land valuation. The department is required to consider all three approaches to value (cost, comparable sales, and income) when appraising improvements.

COMMENT NO. 4: MonTax stated that, regarding the amendments to ARM 42.20.103, the department should consider further clarification of the steps in the process: taxpayer applies on DOR form to county (form should not require taxpayer to fill out the information requested in (4)(g) and (h)); county sends form to DOR by April 1; DOR reviews information and makes field review (fills in (4)(g) and (h)) and sends back to county; county informs DOR local office of approval by a certain date. They stated they would be willing to work with the department on the proposed language.

RESPONSE NO. 4: The department agrees to strike (4)(g) and (h). The department does not agree with the other recommendation from MonTax and will not further amend the rule in that regard.

COMMENT NO. 5: MonTax suggested the department provide examples for ARM 42.20.107 to show other accepted methods it is contemplating when developing the capitalization rate for commercial property.

RESPONSE NO. 5: The department may use any accepted method of developing a capitalization rate. Accepted methods that may be used by the department are addressed in the reference textbook, Property Appraisal and Assessment Administration, chapter titled "Income Capitalization," published by the International Association of Assessing Officers. This textbook is available upon request from the department.

4. Based on the comments received and further review by the department, the department further amends New Rule I (42.20.110), New Rule II (42.19.601), ARM 42.20.103, and ARM 42.20.105 with the following changes:

NEW RULE I (42.20.110) TAX EXEMPTION AND REDUCTION FOR THE REMODELING, RECONSTRUCTION, OR EXPANSION OF CERTAIN COMMERCIAL PROPERTY (1) remains as proposed.

(2) Applications from the local governing body must be received by the department for review before April 1 of the tax year for which the benefits are sought. The department will ATTEMPT TO perform a field evaluation WITHIN 30 DAYS OF RECEIPT OF THE APPLICATION and provide THAT information to advise the local governing body whether the remodeling, reconstruction, or expansion of the existing building or structure increases the taxable value of that structure or building by at least 5%.

(3) remains as proposed.

(4) The department shall provide application forms (AB-56A) to all local governing bodies. The applicant shall provide the following information on the application form:

- (a) property owner's name;
- (b) description of property;
- (c) location of property;
- (d) legal description of property;
- (e) mailing address for the owner of property including:
 - (i) city;
 - (ii) state; and
 - (iii) zip code;
- (f) taxable value increase due to remodeling;
- (g) ~~assessment/tax computation;~~
- (h) ~~date received by department office;~~
- (i) starting date for the remodeling, reconstruction, or expansion; AND
- (j)(h) owner's signature; and
- (k) ~~approval or denial of application by governing body.~~

(5) through (8) remain as proposed.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-24-1502, MCA

NEW RULE II (42.19.601) NOTIFICATION OF CLASSIFICATION AND APPRAISAL TO OWNERS OF MULTIPLE UNDIVIDED OWNERSHIPS (1) If

the owners of a parcel of real property held in multiple undivided ownership, PRIOR TO APRIL 30, 2001, designated more than one recipient of the notice of assessment, or did not supply the department with the name and mailing address of a designated recipient, the department will designate the owner whose surname appears first, alphabetically, on the current tax record TO WHOM THE NOTICE OF ASSESSMENT IS SENT. THIS DESIGNATION IS BASED ON THE BEST INFORMATION AVAILABLE TO THE DEPARTMENT AND INCLUDES THE:

- (a) FIRST SURNAME ALPHABETICALLY;
- (b) SURNAME HOLDING THE LARGEST PERCENT OF OWNERSHIP; OR
- (c) SURNAME OF THE PERSON WITH THE MOST RELIABLE ADDRESS.

(2) AS SUBSEQUENT OWNERSHIP CHANGES OCCUR TO A MULTIPLE UNDIVIDED OWNERSHIP PARCEL, AFTER APRIL 30, 2001, THE DEPARTMENT WILL USE THE SURNAME AND ADDRESS OF THE FIRST CO-TENANT LISTED ON THE RECORDED DOCUMENT.

(3) ANY CO-TENANT NOT DESIGNATED AS A RECIPIENT MAY REQUEST A COPY OF THE ASSESSMENT INFORMATION FROM THE

DEPARTMENT.

AUTH: 15-1-201, MCA

IMP: 15-7-138, MCA

42.20.103 TAX BENEFITS FOR THE REMODELING, RECONSTRUCTION, OR EXPANSION OF EXISTING BUILDINGS OR STRUCTURES

(1) remains as proposed.

(2) Applications from the local governing body must be received by the department for review before April 1 of the tax year for which the benefits are sought. The department will ATTEMPT TO perform a field evaluation WITHIN 30 DAYS OF RECEIPT OF THE APPLICATION AND PROVIDE THAT INFORMATION TO advise the local governing body whether the remodeling, reconstruction, or expansion of the existing building or structure increases the taxable value of that structure or building by at least 2.5%.

(3) remains as proposed.

(4) Sufficient quantities of application forms (AB-56) will be provided to all local governing bodies by the department. Additional application forms will be made available upon request. The application form shall require the submission of the following information by the applicant:

- (a) property owner's name;
- (b) description of property;
- (c) location of property;
- (d) legal description of property;
- (e) mailing address of owner of property, including:

- (i) city;
- (ii) state; and
- (iii) zip code;

(f) taxable value increase due to remodeling;

(g) ~~assessment/tax computation;~~

~~(h) date received by department office;~~

~~(i) starting date of the remodeling, reconstruction, or expansion; AND~~

~~(j)(h) owner's signature; and~~

~~(k) approval or denial of application by governing body.~~

(5) through (10) remain as proposed.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-24-1501, MCA

42.20.105 CONDOMINIUMS (1) remains as proposed.

(2) The department will employ the following appraisal and assessment methodology for the appraisal of condominiums, except for time-share condominiums.

(a) and (b) remain as proposed.

(c) THE VALUE OF THE INDIVIDUAL UNITS IS CALCULATED FROM THE VALUE OF THE ENTIRE CONDOMINIUM PROJECT DIVIDED BY EACH UNIT'S PERCENTAGE OF THE COMMON ELEMENTS. THE PERCENTAGE EXPRESSED IN THE CONDOMINIUM PROJECT'S DECLARATIONS SHALL BE CONSIDERED BY THE DEPARTMENT AS THE RELATION THAT THE VALUE OF THE UNIT AT THE DATE OF THE DECLARATION BEARS TO THE THEN COMBINED VALUE OF ALL THE UNITS HAVING AN INTEREST IN THE PARTICULAR COMMON ELEMENTS.

(3) through (3)(c) remain as proposed.

AUTH: Sec. 15-1-201, MCA

IMP: Sec. 15-7-103, MCA

5. Therefore, the department amends ARM 42.20.101, 42.20.102, 42.20.106, 42.20.107, 42.20.108, 42.20.109, 42.20.201, 42.20.203, 42.20.204, 42.20.205, 42.20.301, 42.20.302, 42.20.303, 42.20.305, 42.20.432, 42.20.454, 42.20.455; and repeals ARM 42.20.104 and 42.20.136 as proposed; and adopts New Rule I (42.20.110) and New Rule II (42.19.601), and amends ARM 42.20.103 and 42.20.105 with the additional amendments listed above.

6. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson

CLEO ANDERSON

Rule Reviewer

/s/ Kurt G. Alme

KURT G. ALME

Director of Revenue

Certified to Secretary of State December 16, 2002

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
ARM 42.21.113, 42.21.123,) AND REPEAL
42.21.125, 42.21.131, 42.21.137,))
42.21.138, 42.21.139, 42.21.140,))
42.21.151, 42.21.153, 42.21.155,))
42.21.158, 42.21.160, and))
42.22.1311; and repeal of ARM))
42.21.122 relating to personal))
property and centrally assessed))
property tax trend tables))

TO: All Concerned Persons

1. On October 31, 2002, the department published notice of proposed amendment and repeal of the above-stated rules relating to personal property and centrally assessed property tax trend tables at page 3019 of the 2002 Montana Administrative Register, issue no. 20.

2. A public hearing was held on November 25, 2002, to consider the proposed amendment and repeal. No one appeared to testify and no written comments were received.

3. The department has amended and repealed the rules as proposed.

4. An electronic copy of this Adoption Notice is available through the Department's site on the World Wide Web at http://www.state.mt.us/revenue/rules_home_page.htm, under the Notice of Rulemaking section. The Department strives to make the electronic copy of this Adoption Notice conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Kurt G. Alme
KURT G. ALME
Director of Revenue

Certified to Secretary of State December 16, 2002

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- ▶ Department of Agriculture;
- ▶ Department of Commerce;
- ▶ Department of Labor and Industry;
- ▶ Department of Livestock;
- ▶ Department of Public Service Regulation; and
- ▶ Office of the State Auditor and Insurance Commissioner.

Education and Local Government Interim Committee:

- ▶ State Board of Education;
- ▶ Board of Public Education;
- ▶ Board of Regents of Higher Education; and
- ▶ Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- ▶ Department of Public Health and Human Services.

Law and Justice Interim Committee:

- ▶ Department of Corrections; and
- ▶ Department of Justice.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA
AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

- | | |
|-------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Known
Subject | 1. Consult ARM topical index.
Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute
Number and
Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2002. This table includes those rules adopted during the period October 1, 2002 through December 31, 2002 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2002, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 2001 and 2002 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in November 2002, appear. Vacancies scheduled to appear from January 1, 2003, through March 31, 2003, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of December 6, 2002.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Radiologic Technologists (Labor and Industry)			
Dr. John Hanson Billings	Governor	Alzheimer	11/26/2002 7/1/2005
Qualifications (if required): physician who employs a radiologic technologist			
Commission on Community Service (Labor and Industry)			
Mr. Mike McGinley Dillon	Governor	not listed	11/13/2002 7/1/2005
Qualifications (if required): representative of local government			
Committee on Telecommunications Access Services for Persons with Disabilities (Public Health and Human Services)			
Mr. Joe Mathews Helena	Governor	LeFebvre	11/13/2002 7/1/2004
Qualifications (if required): representative of Department of Public Health and Human Services			
Governor's Advisory Council on Disability (Administration)			
Mr. Karl Blomquist, Jr. Deer Lodge	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Mr. David Diehl East Helena	Governor	reappointed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Ms. Bernadine Gantert Missoula	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Governor's Advisory Council on Disability (Administration) cont. Mr. Gene Haire Helena Qualifications (if required): public member	Governor	reappointed	11/26/2002 11/26/2004
Ms. Katherine Kountz Helena Qualifications (if required): ex-officio member	Governor	reappointed	11/26/2002 11/26/2004
Ms. Shelley Laing Kalispell Qualifications (if required): public member	Governor	reappointed	11/26/2002 11/26/2004
Dr. Margaret J. Osika Warm Springs Qualifications (if required): public member	Governor	not listed	11/26/2002 11/26/2004
Mr. Brian Tocher Great Falls Qualifications (if required): public member	Governor	not listed	11/26/2002 11/26/2004
Governor's HIV/AIDS Advisory Council (Public Health and Human Services)			
Sen. John Bohlinger Billings Qualifications (if required): legislator	Governor	not listed	11/26/2002 11/26/2004
Ms. LeeAnn Bruisedhead Lame Deer Qualifications (if required): Native American	Governor	not listed	11/26/2002 11/26/2004

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Governor's HIV/AIDS Advisory Council (Public Health and Human Services) cont.			
Mr. Frank Gary Butte	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Ms. Kathryn L. Hall Billings	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Mr. David Herrera Missoula	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Ms. Becky Ketterling Billings	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Sister Mary Vincentia Maronick Billings	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Ms. Mary Jane Nealon Missoula	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		
Pastor Jack Preston Lincoln	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required):	public member		

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Governor's HIV/AIDS Advisory Council (Public Health and Human Services) cont.			
Ms. Aimee Sandon Helena	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Mr. Jesse Sherratt Helena	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): student representative			
Ms. Annie Tavary Helena	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Mr. Steve Woodward Missoula	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Mr. Steven C. Yeakel Helena	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Mr. Fred Zaino Conrad	Governor	not listed	11/26/2002 11/26/2004
Qualifications (if required): public member			
Lewis and Clark Bicentennial Commission (Historical Society)			
Mr. Wyman McDonald Helena	Governor	White	11/7/2002 10/1/2004
Qualifications (if required): representative of a Montana Indian tribe			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Montana Drought Advisory Committee (Natural Resources and Conservation)			
Mr. Ed Diemert Lothair	Governor	Blattie	11/13/2002 0/0/0
Qualifications (if required): non-voting representative of local government			
Montana Licensed Addiction Counselor's Program Advisory Council (Labor and Industry)			
Ms. Marian Scofield Billings	Director	not listed	11/25/2002 11/25/2004
Qualifications (if required): representing Montana Association of Alcoholism and Drug Abuse Counselors			
Mr. Joel Wagner Billings	Director	not listed	11/25/2002 11/25/2004
Qualifications (if required): public member			
Ms. Karen Workman Great Falls	Director	not listed	11/25/2002 11/25/2004
Qualifications (if required): university member			
Montana Vocational Rehabilitation Council (Public Health and Human Services)			
Ms. Ruth Straley Helena	Director	Egan	11/4/2002 11/4/2004
Qualifications (if required): federally mandated business, industry and labor position			
Property Tax Reappraisal Advisory Council (Revenue)			
Ms. Susan Humble Great Falls	Governor	Knedler	11/25/2002 4/30/2003
Qualifications (if required): representative of the business community			

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Upland Game Bird Advisory Council (Fish, Wildlife, and Parks)			
Mr. Ben Deeble	Director	not listed	11/1/2002
Missoula			11/1/2003
Qualifications (if required):	none specified		
Mr. Robert Eng	Director	not listed	11/1/2002
Bozeman			11/1/2003
Qualifications (if required):	none specified		
Mr. Richard Kirstein	Director	not listed	11/1/2002
Scobey			11/1/2003
Qualifications (if required):	none specified		
Mr. Marty Lau	Director	not listed	11/1/2002
Great Falls			11/1/2003
Qualifications (if required):	none specified		
Mr. Dale Manning	Director	not listed	11/1/2002
Missoula			11/1/2003
Qualifications (if required):	none specified		
Mr. Ellis Misner	Director	not listed	11/1/2002
Fairfield			11/1/2003
Qualifications (if required):	none specified		
Mr. Pat Pierson	Director	not listed	11/1/2002
Red Lodge			11/1/2003
Qualifications (if required):	none specified		
Mr. Craig Roberts	Director	not listed	11/1/2002
Lewistown			11/1/2003
Qualifications (if required):	none specified		

BOARD AND COUNCIL APPOINTEES FROM NOVEMBER 2002

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Upland Game Bird Advisory Council (Fish, Wildlife, and Parks) cont.			
Mr. Dale Tribby	Director	not listed	11/1/2002
Miles City			11/1/2003
Qualifications (if required): none specified			
Mr. Ben Williams	Director	not listed	11/1/2002
Livingston			11/1/2003
Qualifications (if required): none specified			
Mr. Lowell Young	Director	not listed	11/1/2002
Plentywood			11/1/2003
Qualifications (if required): none specified			

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Alternative Livestock Advisory Council (Fish, Wildlife, and Parks) Mr. Jeremy Kinross-Wright, Big Timber Qualifications (if required): representative of the Board of Livestock	Governor	1/1/2003
Mr. John Lane, Cascade Qualifications (if required): representative of the Fish, Wildlife, and Parks Commission	Governor	1/1/2003
Appellate Defender Commission (Administration) Judge Dorothy B. McCarter, Helena Qualifications (if required): district judge	Governor	1/1/2003
Mr. Michael Sherwood, Missoula Qualifications (if required): attorney	Governor	1/1/2003
Board of Aeronautics (Transportation) Mr. John Rabenberg, Fort Peck Qualifications (if required): public member	Governor	1/1/2003
Ms. Josephine Eisenzimer, Cascade Qualifications (if required): engaged in aviation education	Governor	1/1/2003
Mr. Craig Denney, Billings Qualifications (if required): commercial airline representative	Governor	1/1/2003
Mr. Bob Palmersheim, Fromberg Qualifications (if required): fixed base operator	Governor	1/1/2003
Board of Architects (Commerce) Mr. John W. Peterson, Kalispell Qualifications (if required): registered architect	Governor	3/27/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Chiropractors (Commerce) Dr. Pamela Blanchard, Great Falls Qualifications (if required): practicing chiropractor	Governor	1/1/2003
Ms. Jo Ausk, Terry Qualifications (if required): public member	Governor	1/1/2003
Board of Crime Control (Justice) Mr. Craig Anderson, Glendive Qualifications (if required): chief probation officer	Governor	1/1/2003
Mr. Gary Buchanan, Billings Qualifications (if required): public member	Governor	1/1/2003
Rev. Steven Rice, Miles City Qualifications (if required): representative of the Youth Justice Council	Governor	1/1/2003
Ms. Sherry Matteucci, Billings Qualifications (if required): U.S. Attorney	Governor	1/1/2003
Rep. Sylvia Bookout-Reinicke, Alberton Qualifications (if required): state representative	Governor	1/1/2003
Mayor Laurel Frankenfield, Hamilton Qualifications (if required): representative of local government	Governor	1/1/2003
Mr. Richard L. Kirn, Poplar Qualifications (if required): representative of local government	Governor	1/1/2003
Board of Dentistry (Commerce) Dr. George Olsen, Missoula Qualifications (if required): dentist	Governor	3/29/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Environmental Review (Environmental Quality) Ms. Susan K. Brooke, Helena Qualifications (if required): public member	Governor	1/1/2003
Ms. Kim Lacey, Glasgow Qualifications (if required): public member	Governor	1/1/2003
Mr. Joseph Russell, Kalispell Qualifications (if required): county health officer	Governor	1/1/2003
Board of Horse Racing (Commerce) Mr. Tim Donnelly, Miles City Qualifications (if required): representing District 1	Governor	1/20/2003
Ms. Barbara Cole, Shelby Qualifications (if required): representing District 3	Governor	1/20/2003
Board of Housing (Commerce) Mr. Bob Thomas, Stevensville Qualifications (if required): public member	Governor	1/1/2003
Ms. Waneeta Farris, Forsyth Qualifications (if required): public member	Governor	1/1/2003
Ms. Teresa Lightbody, Helena Qualifications (if required): public member	Governor	1/1/2003
Board of Investments (Commerce) Ms. Maureen J. Fleming, Missoula Qualifications (if required): labor representative	Governor	1/1/2003
Mr. Douglas Bardwell, Missoula Qualifications (if required): financial community representative	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Investments (Commerce) cont. Mr. Calvin Wilson, Busby Qualifications (if required): attorney	Governor	1/1/2003
Ms. Karen B. Fagg, Billings Qualifications (if required): businessperson	Governor	1/1/2003
Board of Labor Appeals (Labor and Industry) Ms. Carol Donaldson, Billings Qualifications (if required): attorney	Governor	1/1/2003
Board of Livestock (Livestock) Ms. Meg Smith, Glen Qualifications (if required): cattle producer	Governor	3/1/2003
Mr. George Hammond, Hardin Qualifications (if required): cattle producer	Governor	3/1/2003
Board of Milk Control (Livestock) Dr. R. Clyde Greer, Bozeman Qualifications (if required): Independent	Governor	1/1/2003
Mr. Michael F. Kleese, Stevensville Qualifications (if required): Democrat and an attorney	Governor	1/1/2003
Board of Oil and Gas Conservation (Natural Resources and Conservation) Mr. Denzil Young, Baker Qualifications (if required): landowner with no mineral rights and an attorney	Governor	1/1/2003
Mr. Jack King, Billings Qualifications (if required): representative of the oil and gas industry	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Oil and Gas Conservation (Natural Resources and Conservation) cont. Ms. Elaine Mitchell, Cut Bank Qualifications (if required): public member	Governor	1/1/2003
Board of Pardons and Parole (Corrections) Mr. Patrick T. Fleming, Butte Qualifications (if required): attorney	Governor	1/1/2003
Mr. Michael E. McKee, Hamilton Qualifications (if required): auxiliary member	Governor	1/1/2003
Board of Personnel Appeals (Labor and Industry) Mr. Steve Johnson, Missoula Qualifications (if required): representative of management in collective bargaining	Governor	1/1/2003
Mr. Joe Dwyer, Billings Qualifications (if required): substitute labor representative	Governor	1/1/2003
Mr. Ed Maronick, East Helena Qualifications (if required): substitute management representative	Governor	1/1/2003
Board of Public Assistance (Public Health and Human Services) Mr. John Larson, Clancy Qualifications (if required): public member	Governor	1/1/2003
Board of Public Education (Education) Mr. Storrs M. Bishop, Ennis Qualifications (if required): Republican residing in District 2	Governor	2/1/2003
Board of Regents of Higher Education (Education) Ms. Margie Thompson, Butte Qualifications (if required): Republican from District 2	Governor	2/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Social Work Examiners and Professional Counselors (Commerce) Dr. Leta Livoti, Helena Qualifications (if required): licensed professional counselor	Governor	1/1/2003
Ms. Antoinette Rosell, Billings Qualifications (if required): licensed professional counselor	Governor	1/1/2003
Judge Richard A. Simonton, Glendive Qualifications (if required): public member	Governor	1/1/2003
Children's Trust Fund Board (Public Health and Human Services) Ms. Ann (Punky) Bullis, Crow Agency Qualifications (if required): public member	Governor	1/1/2003
Ms. Kathleen Perez, Harlem Qualifications (if required): public member	Governor	1/1/2003
Coal Board (Commerce) Ms. Janice Riebhoff, Belgrade Qualifications (if required): expertise in education and residing in District 2	Governor	1/1/2003
Ms. Linda Price, Lewistown Qualifications (if required): expertise in education and residing in District 3	Governor	1/1/2003
Mr. John Sutton, Butte Qualifications (if required): engineer residing in District 2	Governor	1/1/2003
Commission on Human Rights (Labor and Industry) Mr. Jack Copps, Seeley Lake Qualifications (if required): public member	Governor	1/1/2003
Ms. Kathy Ogren, Missoula Qualifications (if required): public member	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services) Ms. Sylvia Danforth, Miles City Qualifications (if required): representative of a service provider	Governor	1/1/2003
Sen. Bea McCarthy, Anaconda Qualifications (if required): state legislator	Governor	1/1/2003
Mr. Peyton Terry, Glasgow Qualifications (if required): representative of consumers	Governor	1/1/2003
Mr. Dan McCarthy, Helena Qualifications (if required): representative of the Office of Public Instruction	Governor	1/1/2003
Ms. Florence Massey, Billings Qualifications (if required): representative of Region III	Governor	1/1/2003
Dr. R. Timm Vogelsberg, Missoula Qualifications (if required): representative of university programs	Governor	1/1/2003
Rep. Bob Lawson, Whitefish Qualifications (if required): state legislator	Governor	1/1/2003
Ms. Bernadette Franks-Ongoy, Helena Qualifications (if required): representative of the Montana Advocacy Program	Governor	1/1/2003
Ms. Marlene Tocher, Great Falls Qualifications (if required): consumer	Governor	1/1/2003
Ms. Sally Grover, Helena Qualifications (if required): consumer representative	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services) cont.		
Ms. Ramona Weber, Billings Qualifications (if required): primary consumer	Governor	1/1/2003
Mr. Keven Halsey, Libby Qualifications (if required): primary consumer	Governor	1/1/2003
Ms. Kathy Phillips, Missoula Qualifications (if required): primary consumer	Governor	1/1/2003
Ms. Suzie Twedt, Great Falls Qualifications (if required): representing Region II	Governor	1/1/2003
Mr. Kevin Kosmann, Billings Qualifications (if required): representing Region III	Governor	1/1/2003
Ms. Marlene Disburg, Helena Qualifications (if required): representative of vocational rehabilitation	Governor	1/1/2003
Ms. Jannis Conselyea, Helena Qualifications (if required): representative of the Department of Public Health and Human Services	Governor	1/1/2003
Ms. Kim Evermann, Helena Qualifications (if required): representative of the Older American Act	Governor	1/1/2003
Fish, Wildlife, and Parks Commission (Fish, Wildlife, and Parks)		
Ms. Darlyne Dascher, Fort Peck Qualifications (if required): representative of District 4 and a rancher	Governor	1/1/2003
Mr. Tim Mulligan, Whitehall Qualifications (if required): representative of District 2	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Hard-Rock Mining Impact Board (Commerce) Mr. Donald B. Kinsey, Big Timber Qualifications (if required): public member from District 4	Governor	1/1/2003
Ms. Mary Taylor, Thompson Falls Qualifications (if required): school district trustee and residing in District 1	Governor	1/1/2003
Ms. Betty Aye, Broadus Qualifications (if required): public member residing in District 4	Governor	1/1/2003
Judicial Nomination Commission (Justice) Mr. Frank Stock, Polson Qualifications (if required): public member	Governor	1/1/2003
Missouri River Basin Advisory Council (Natural Resources and Conservation) Ms. Diane Brandt, Glasgow Qualifications (if required): public member	Governor	3/20/2003
Mr. Don Pfau, Lewistown Qualifications (if required): public member	Governor	3/20/2003
Mr. Bud Clinch, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	3/20/2003
Mr. Jim Rector, Glasgow Qualifications (if required): public member	Governor	3/20/2003
Mr. Ron Miller, Glasgow Qualifications (if required): public member	Governor	3/20/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Missouri River Basin Advisory Council (Natural Resources and Conservation) cont. Mr. Steve Page, Glasgow Qualifications (if required): public member	Governor	3/20/2003
Mr. Tom Huntley, Sidney Qualifications (if required): public member	Governor	3/20/2003
Mr. John Foster, Lewistown Qualifications (if required): public member	Governor	3/20/2003
Mr. Boone A. Whitmer, Wolf Point Qualifications (if required): public member	Governor	3/20/2003
Mr. Buzz Mattelin, Brockton Qualifications (if required): public member	Governor	3/20/2003
Montana Arts Council (Education) Ms. Ann Cogswell, Great Falls Qualifications (if required): public member	Governor	2/1/2003
Mr. Richard Halmes, Billings Qualifications (if required): public member	Governor	2/1/2003
Ms. Sody Jones, Billings Qualifications (if required): public member	Governor	2/1/2003
Ms. Jackie Parsons, Browning Qualifications (if required): public member	Governor	2/1/2003
Ms. Diane Klein, Kalispell Qualifications (if required): public member	Governor	2/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana Facility Finance Authority (Commerce) Mr. Kenneth Jansa, Glasgow Qualifications (if required): public member	Governor	1/1/2003
Montana Grass Conservation Commission (Natural Resources and Conservation) Ms. Sandra Brown, Terry Qualifications (if required): public member	Governor	1/1/2003
Montana Health Facility Authority (Commerce) Mr. John Bartos, Corvallis Qualifications (if required): public member	Governor	1/1/2003
Mr. Greg Hanson, Missoula Qualifications (if required): public member	Governor	1/1/2003
Montana Higher Education Student Assistance Corporation (Education) Ms. Jean Hagan, Big Fork Qualifications (if required): public member	Governor	1/1/2003
Risk Management Advisory Council (Administration) Mr. John Huth, Helena Qualifications (if required): representative of the State Auditor's Office	Governor	2/21/2003
Ms. Julia Dilly, Helena Qualifications (if required): representative of the Office of Public Instruction	Governor	2/21/2003
Mr. Devin Garrity, Helena Qualifications (if required): representative of the Department of Administration	Governor	2/21/2003
Mr. Larry Delaney, Helena Qualifications (if required): representative of the office of Higher Education	Governor	2/21/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Risk Management Advisory Council (Administration) cont. Ms. Beth McLaughlin, Helena Qualifications (if required): representative of the Judiciary	Governor	2/21/2003
Ms. Donna Wrubel, Helena Qualifications (if required): representative of the Department of Military Affairs	Governor	2/21/2003
Mr. Joe DeFilippis, Helena Qualifications (if required): representative of the Secretary of State's Office	Governor	2/21/2003
Ms. Christina Synness, Helena Qualifications (if required): representative of the office of Political Practices	Governor	2/21/2003
Mr. Danny Corti, Missoula Qualifications (if required): representing University of Montana	Governor	2/21/2003
Ms. Laura Calkin, Helena Qualifications (if required): representing Department of Public Service Regulation	Governor	2/21/2003
Mr. George Harris, Helena Qualifications (if required): representing Department of Livestock	Governor	2/21/2003
Ms. Kathy Battrick, Helena Qualifications (if required): representing Department of Public Health and Human Services	Governor	2/21/2003
Mr. Brett Dahl, Helena Qualifications (if required): representing the Governor's Office	Governor	2/21/2003
Mr. Todd Saarinen, Helena Qualifications (if required): representing the Historical Society	Governor	2/21/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Risk Management Executive Council (Administration) cont. Ms. Patti Forsness, Helena Qualifications (if required): representing Department of Justice	Governor	2/21/2003
Mr. Dave Brown, Helena Qualifications (if required): representing the Legislative Branch	Governor	2/21/2003
Ms. Linda McKinney, Helena Qualifications (if required): representing Department of Agriculture	Governor	2/21/2003
Mr. William "Skip" Lopuch, Helena Qualifications (if required): representing Department of Corrections	Governor	2/21/2003
Mr. Doug Denler, Helena Qualifications (if required): representing Department of Fish, Wildlife, and Parks	Governor	2/21/2003
Ms. Diane West, Helena Qualifications (if required): representing Department of Labor and Industry	Governor	2/21/2003
Mr. Bill Miller, Helena Qualifications (if required): representing Department of Natural Resources and Conservation	Governor	2/21/2003
Mr. Ray Eby, Helena Qualifications (if required): representing Department of Transportation	Governor	2/21/2003
Ms. Barbara Hagel, Billings Qualifications (if required): representing MSU Billings	Governor	2/21/2003
Ms. Susan Thomas, Great Falls Qualifications (if required): representing MSU College of Technology	Governor	2/21/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Risk Management Executive Council (Administration) cont. Ms. Marilyn Cameron, Butte Qualifications (if required): representing the Montana Tech of the UM	Governor	2/21/2003
Mr. Jeff Shada, Bozeman Qualifications (if required): representing MSU Bozeman	Governor	2/21/2003
Mr. Bob Hoover, Havre Qualifications (if required): representing MSU Northern	Governor	2/21/2003
Mr. Ken Willett, Missoula Qualifications (if required): representing University of Montana	Governor	2/21/2003
Mr. Bob Campbell, Dillon Qualifications (if required): representing Western Montana College of UM	Governor	2/21/2003
Ms. Barbara Sawitzke, Helena Qualifications (if required): representing the Office of Public Instruction	Governor	2/21/2003
Ms. Erica Hess, Helena Qualifications (if required): representing the Secretary of State's Office	Governor	2/21/2003
Mr. Steve Halferty, Helena Qualifications (if required): representing State Fund	Governor	2/21/2003
Mr. D.J. Whitaker, Helena Qualifications (if required): representing the Helena College of Technology of the University of Montana	Governor	2/21/2003
Ms. Teri Juneau, Helena Qualifications (if required): representing the Department of Commerce	Governor	2/21/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Risk Management Executive Council (Administration) cont. Ms. Sandy Lang, Helena Qualifications (if required): representing the Department of Revenue	Governor	2/21/2003
Mr. Peter Donovan, Helena Qualifications (if required): representative of the Board of Public Education	Governor	2/21/2003
State Employee Group Benefits Advisory Council (Administration) Mr. Steve Barry, Helena Qualifications (if required): none specified	Director	1/1/2003
Ms. Barbara Smith, Helena Qualifications (if required): none specified	Director	1/1/2003
Ms. Kathleen Martin, Helena Qualifications (if required): none specified	Director	1/1/2003
Mr. Monte Brown, Helena Qualifications (if required): none specified	Director	1/1/2003
Ms. Amy Carlson, Helena Qualifications (if required): none specified	Director	1/1/2003
State Tax Appeal Board (Administration) Mr. Gregory Thornquist, Helena Qualifications (if required): public member	Governor	1/1/2003
Transition Advisory Committee (Legislative Services) Mr. Russ Ritter, Helena Qualifications (if required): representing the industrial community	Governor	1/1/2003

VACANCIES ON BOARDS AND COUNCILS -- JANUARY 1, 2003 through MARCH 31, 2003

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Transition Advisory Committee (Legislative Services) cont. Mr. Gene Leuwer, Helena Qualifications (if required): representing a low-income program provider	Governor	1/1/2003
Mr. Stephen E. Bradley, Crow Agency Qualifications (if required): representing Montana's Indian tribes	Governor	1/1/2003
Ms. Kathie Roos, Helena Qualifications (if required): representing the environmental and conservation community	Governor	1/1/2003
Mr. Jerry Driscoll, Helena Qualifications (if required): representing organized labor	Governor	1/1/2003
Mr. Paul Farr, Billings Qualifications (if required): representing the electric power market industry	Governor	1/1/2003
Ms. Kathy Rice, Great Falls Qualifications (if required): representing the nonindustrial retail electric consumer sector	Governor	1/1/2003
Mr. David Kinnard, Billings Qualifications (if required): representing the electric power market industry	Governor	1/1/2003
Transportation Commission (Transportation) Ms. Nancy Espy, Broadus Qualifications (if required): Republican from District 4	Governor	1/1/2003
Mr. Dan Larson, Libby Qualifications (if required): Democrat from District 1	Governor	1/1/2003